REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Court of King's Bench,

With Tables of the Names of Cases and Principal Matters.

By EDWARD HYDE EAST, Esq.

OF THE INNER TEMPLE, BARRISTER AT LAW.

Si quid novisti rectius istis,
Candidus imperti; si non, his utere mecum. Hor.

VOL. V.

Containing the Cases of Easter, Trinity, and Michaelmas Terms
In the 44th and 45th Years of Geo. III. 1804.

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1805.

JUDGES

OF THE

COURT OF KING's BENCH,

During the Period of these REPORTS.

EDWARD Lord ELLENBOROUGH, C. J.
Sir NASH GROSE, Knt.
Sir SOULDEN LAWRENCE, Knt.
Sir SIMON LE BLANC, Knt.

ATTORNEY-GENERAL.

The Honorable SPENCER PERCEVAL.

SOLICITOR-GENERAL.

Sir THOMAS MANNERS SUTTON, Knt.

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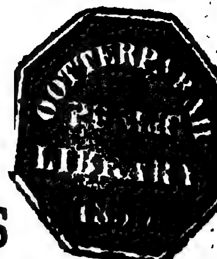
TABLE

OF THE

CASES REPORTED

IN THIS FIFTH VOLUME.

N. B. Those Cases which are printed in *Italics* were cited from *MS.* Notes.



CASES

ARGUED AND DETERMINED   1804.

IN THE

Court of KING's BENCH,

IN

Eaſter Term,

In the Forty-fourth Year of the Reign of GEORGE III.

IN the laſt vacation died, at his houſe in *George-ſtreet, Weſtminſter*, the Right Honorable RICHARD PEPPER Lord ALVANLEY, Lord Chief Juſtice of the Court of Common Pleas. He was ſucceeded in this term by

JAMES MANSFIELD, Eſq. one of His Majeſty's Counſel learned in the Law, who was ſworn into office on *Tueſday* the 24th of *April*, and was knighted. And on the 25th he was called to the degree of Serjeant at Law, and took his ſeat on the Bench, and gave rings with this motto, *Serus in Cœlum redeas.*

On *Saturday* the 28th of *April* the following Gentlemen took their places within the Bar:

As one of His Majeſty's Serjeants learned in the Law, Mr. Serjeant *Williams*.

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As His Majesty's Counsel learned in the Law,
Richard Hollist, of the Middle Temple, Esq.
Thomas Milles, of Lincoln's Inn, Esq.
George Wilson, of Lincoln's Inn, Esq.
James Topping, of the Inner Temple, Esq.

With a Patent of Precedence,
John Fonblanque, of the Middle Temple, Esq.

Thursday, April 19th.

The Mayor, &c. of CARLISLE *against* WILSON.

Where it appeared in evidence upon an action of indebitatus assumpsit for toll that a corporation were entitled by a general grant of toll, explained by usage to be due for all commercial goods passing in and out of their city on horses or in carts or waggons, (that is, at the rate of 1*d.* for every horse-load, and 2*d.* for every cart-load drawn by one horse, and 2*d.* more for each additional horse); held that any alteration of the carriage by which the goods were so conveyed, as by taking them in stage coaches instead of carts or waggons, could not vary the right of toll in the proportion of 2*d.* for each horse drawing the coach, although the number of horses were estimated by the weight of passengers rather than of goods.

IN assumpsit, the fourth count, to which the evidence of the plaintiffs principally applied, was on an indebitatus assumpsit for tolls and duties due and payable from the defendants to the plaintiffs for the passage of coaches and carriages of the defendants, loaded with goods and merchandizes, in and through the city of *Carlisle*. Plea, non assumpsit. The action was brought to try the right of the corporation to take toll from the defendants as the proprietors of a stage coach passing in and out of the city with parcels, who claimed to be exempt, principally on the ground that their carriages were chiefly adapted to the conveyance of passengers, and that the taking of goods for hire was only a secondary incidental employment. At the trial before *Chambre* J. at *Carlisle*, the plaintiffs, in support of their claim to toll for horses, carts, and carriages, passing with goods in and out of the city, produced in evidence an inquisition taken at *Carlisle* on the 6th of *April*, 25 *Ed.* 3., and returned into Chancery, concerning the liberties and customs belonging to the city of *Carlisle*, &c. and why the citizens had not rendered to the Crown

80*l.* per annum rent for the profits of the liberties, &c. whereby it was found that the citizens of the said city had been accustomed to have amongst their liberties and customs, (inter alia,) "Theolonium intrinsecum et forinsecum vocat. *Thurg-Toll* (*i. e.* Toll Thorough) ut parcellas firmæ civitatis illius; et quodque prædicti cives habuerunt omnes libertates et proficua prædicta a tempore quo non existit memoria quousque," &c. and then stating a wrongful obstruction in the exercise of their rights. Also a charter from the Crown of the 7th of *February*, 26 *Ed.* 3. reciting the said inquisition, and granting to the citizens (inter alia) the said toll, by the same description as in the inquisition. And this charter, together with all liberties, customs, privileges, franchises, immunities, jurisdictions, and grants, is ratified and confirmed to the corporation by a charter of the 13 *Car.* 1., under which the corporation has its present corporate name. Also the usage of the corporation to repair and pave all the streets of the city was proved and admitted. With respect to the collection in fact of toll, it appeared to have been the usage as far back as living memory could trace to pay 1*d.* for every horse-load of commercial goods for sale, either carried in or out of the city; (unless the goods were under the value of 13½*d.*, and then no more than half toll was ever paid, and sometimes nothing). If the goods were conveyed in a cart drawn by one horse, then 2*d.* was paid; if by more than one horse, 2*d.* in addition for each horse, unless the carriers compounded for their tolls. The value of the goods in carts made no difference; but if the horse or cart merely passed through the city with the same goods, they paid but one toll. For many years back the proprietors of public *waggons* had usually compounded for their tolls; if not, 2*d.* a-horse

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was taken from the waggoner. Nothing was ever taken for hay, corn, houfehold goods, &c. It further appeared that ftage coaches had been ufed in *Carlifle* for about 50 years paft; but no claim was made in refpect of them for toll till about 15 years ago, which was then refifted. That where the proprietors had forwarded goods in carts they had paid the ufual toll; and they had alfo paid when fifh and other articles had been fent into the city to be forwarded by the coaches: but this was explained to be toll paid for the bringing in of fuch articles by horfes or carts, and not for the fending them on by the coaches. The goods for which toll was demanded in this inftance were commercial goods for fale fent by the defendants' coach. The defendants produced no evidence; and the cafe went to the jury with the learned Judge's obfervations to them, that the right to the horfe and cart toll was clearly proved, and that poffibly the confequence of that ufage might, as to the toll in difpute, be a mere legal queftion upon which either party might take the opinion of the Court above: and he therefore left the cafe to them upon the ufage; telling them that if they were fatisfied that the plaintiffs were entitled to a toll on carriages carrying goods (fuch as had been in ufe) the payment of the toll could not be evaded merely by ufing carriages of a different conftruction from common carts and carriages; and that the only diftinction he could point out for their attention was that the principal ufe of the coaches being for the carriage of paffengers, for which no toll was due, and it appearing that the quantum of the toll was eftimated by the number of horfes employed in drawing the carriages, the proportion of the number of horfes to them muft be greater than the relative quantity of the goods which they carried would require; in confequence of which a much

much heavier toll in respect of the goods would fall on the coach-owners than on the owners of other carriages used chiefly for the conveyance of goods. And also that for a considerable number of years since coaches had been set up in *Carlisle* the corporation had not asserted their claim of toll for such carriages. The jury found a verdict for the defendants. But upon the report of the case, after a rule Nisi granted in *Michaelmas* term last for setting aside the verdict and granting a new trial, the learned Judge intimated a doubt whether the evidence did not require him to have told the jury that if they were satisfied that the right to the toll for the passage of carts and waggons was established by the written and parol evidence, it would follow as a legal consequence that the plaintiffs were entitled to the like toll for the passage of coaches carrying goods of the like description.

Park, *Holroyd*, and *Hullock*, in shewing cause against the rule, contended that the grant of toll, being in general terms, must be construed and restrained by the usage; and here it appeared by the evidence to be a grant of toll for the carriage of goods sub modo, that is, by horses or in carts or waggons. In the single instance that any attempt was made to extend it to coaches the claim was resisted with effect; and this extends back through a period of 50 years. And there is no absurdity in supposing that a toll might be granted on goods carried in a particular manner, which was not meant to extend to goods carried in a different way; especially as the toll in this case varies according to the number of horses employed in the draught of the carriage, which may be reasonable enough as applied to carriages whose principal use is for the conveyance of goods, as furnishing a good criterion of

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the weight of the draught, and consequently apportioning the toll to the probable injury done to the streets: but as applied to coaches, the number of whose horses is adapted to the weight of passengers, for whom no toll is payable, and not to the goods, which may be trifling in weight and value, the same rate of toll must press very unequally and unfairly. By these means the same toll may be paid for one small parcel which happens to be in a coach drawn by four horses as for various goods to a considerable amount drawn by the same number of horses in a cart or waggon. It is not therefore the shape or denomination of the carriage which constitutes the difference, but the purpose to which it is principally applied.

Cockell Serjt. *Wood*, *Topping*, and *Raine*, contrà, were stopped by the Court.

Lord ELLENBOROUGH C. J. The custom in substance, as to the present inquiry, is to pay a toll for goods conveyed in carriages in proportion to the number of horses: what the form or denomination of the carriage may be is immaterial, whether it be cart, waggon, or coach; if it be applied to the use of drawing goods for sale the custom attaches upon it. The reason why the toll has not been in fact collected from the owners of public coaches is because till of late years it has not been the general custom of that part of the country to convey goods in such carriages, and therefore the collection of it might not have been worth attending to: and there is no reason to attribute the omission to any other cause. Within the memory of living persons there were no more than four coaches kept in *Cumberland*. Bishop *Nicolson*, who wrote a history of that county, states that about the year 1710,

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in travelling from *Rose Castle*, near *Carlisle* towards *London*, with a young nobleman his pupil, they were obliged to go as far as *Stamford* before they met with a stage-coach to carry them on. As to the disproportion stated to arise from the application of the toll to carriages of this description, where the number of horses is adapted more to the carriage of passengers than of goods, that is the party's own act, of which he cannot complain. The corporation cannot discriminate the proportion adapted to each, and may therefore charge for the whole number which are actually used for the draught of the carriage in which tollable goods are conveyed; for the toll is payable in respect of the goods and not of the coach. Upon the same principle, where a man mixes his corn with mine in my bag, I may take the whole, because I cannot distinguish to separate them again, and it was his own fault to mingle them. So if the coach-owners will multiply the number of their horses because of the additional weight of passengers which they carry, together with goods for which the toll is payable in proportion to such number, it is their own act, and the corporation have no means of ascertaining the proportion of horses used for each. Here then the right to the toll having been clearly made out, there must be a new trial.

GROSE J. The question is, Whether any thing were due for toll in this case? The toll is that duty which persons passing in or out of the city with goods for sale on horseback or in carriages are liable to pay. It is not merely for the passage of the person, but of the person with goods. The usage was for some time probably confined to goods carried on horseback; afterwards, as carts came into common use, it was extended to them; and

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there is no reafon why the toll fhould not be extended to coaches, fince they have come into ufe for the purpofe of conveying commercial goods. And as to thefe latter having been fuffered to carry for fome years back without the corporation collecting from them, it was probably not worth their while to collect it in the firft inftance, till that mode of conveyance grew to be more frequent. But fince that is the cafe, there is no reafon why the fame toll fhould not be collected from carriages of this defcription as from carts when applied to the fame purpofe.

LAWRENCE J. The toll is payable for goods conveyed on horfes and in carriages; and in order to meafure the quantum of toll in the latter cafe they reckon the number of horfes ufed in the conveyance. And when we attend to the occafion of granting the toll, which was for the repair of the ftreets, fuch a meafure feems reafonable. For if the goods were carried on horfeback, that was not confidered as occafioning much damage to the ftreets, and therefore the toll was only 1*d.*: but if conveyed in a cart with one horfe, the damage done was confidered to be double, and 2*d.* was taken: and if more horfes were neceffary to draw the weight, the injury was reckoned to be proportionably greater. The carrier was confidered to be a competent judge of the number of horfes required to draw the weight, and that mode of afcertaining the quantum of the toll was liable to no difficulty or difpute. It is no objection then that the coach may have but one parcel of goods to convey; for it is for the carrier to confider whether it be worth his while to proceed with his load or not; but if he do, he muft pay toll according to the number of horfes which he ufes.

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LE BLANC J. By the inquifition and ancient grants it appears that toll was given to the citizens of *Carlifle* in general terms, leaving it uncertain by what the quantum was to be meafured. This is fupplied by the evidence of the ufage, whence it appears that it is to be eftimated by the horfe-load when the goods are carried in that manner, or when conveyed in carriages, by the number of horfes drawing each carriage. Formerly it appears that the only carriages in which goods were conveyed were carts and waggons; and it is not at all improbable that when thofe were the only carriages in ufe, they took as many paffengers in proportion to the quantity of goods as coaches do now. Yet during all that time the toll has always been claimed from the carrier, and not from the proprietors of the refpective goods, in proportion to the number of horfes by which the carriage was drawn. And it is more advantageous to the public that the toll fhould be collected in this manner: for when claimed from the carrier he pays one entire toll for all the parcels of goods together in proportion to the number of his horfes; but if it were to be claimed from the owners of the goods, then each would have to pay toll according to the fame proportion. If then the coach proceed with paffengers only, without any commercial goods, no toll will be payable; but if it have fuch goods in it, the toll is payable according to the number of horfes by which the coach is drawn. In this manner it has always been collected from carts and waggons; and altering the form or name of the carriage can never affect the claim to the toll.

Rule abfolute.

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Thursday, April 19th.

WAIN and Another *against* WARLTERS.

No person can, by the statute of frauds, be charged upon any *promise* to pay the debt of another, unless the *agreement* upon which the action is brought, or some note or memorandum thereof, be *in writing*; by which word *agreement* must be understood the *consideration* for the promise as well as the *promise* itself. And therefore where one promised in writing to pay the debt of a third person, without stating on what consideration; it was holden that *parol* evidence of the consideration was inadmissible by the statute of frauds; and consequently such promise appearing to be without consideration upon the face of the written engagement, it was nudum pactum and gave no cause of action.

THE plaintiffs declared that at the time of making the promise after-mentioned they were the indorsees and holders of a bill of exchange, dated the 14th of *February* 1803, drawn by one *W. Gore* upon and accepted by one *J. Hall*, whereby *Gore* requested *Hall*, seventy days after date, to pay to his, *Gore's*, order, 56*l.* 16*s.* 6*d.*; which bill of exchange *Gore* had before then indorsed to the plaintiffs, and which sum in the bill mentioned was at the time of making the promise by the defendant due and unpaid. And thereupon the plaintiffs, before and at the time of making the said promise by the defendant, had retained one *A.* as their attorney to sue *Gore* and *Hall* respectively for the recovery of the said sum so due, &c. whereof the defendant, at the time of his promise, &c. had notice. And thereupon, on the 30th of *April* 1803, at, &c. *in consideration of the premises, and that the plaintiffs*, at the instance of the defendant, *would forbear* to proceed for the recovery of the said 56*l.* 16*s.* 6*d.* he, the defendant, undertook and promised the plaintiffs to pay them by half past four o'clock on that day 56*l.* and the *expences* which had *then been incurred* by them *on the said bill*. The plaintiffs then averred that they did, within a reasonable time after the defendant's promise, stay all proceedings for the recovery of the said debt, and have hitherto *forborne to proceed* for the recovery thereof; and that the expences by them incurred on the said bill at the time of making the promise by the defendant, and in respect of their having so retained the said *A.*, and on account of his having, before the defendant's said promise,

drawn

drawn and ingroffed certain writs called fpecial capias' 1804.
againft *Gore* and *Hall* refpectively on the faid bill,
amounted to 20*l*., of which the defendant had notice;
yet the defendant did not at half paft four o'clock on that
day, &c. nor at any time before or fince, pay the faid fum
of 56*l*. and the faid expences incurred, &c. There was
another fpecial count, charging that the reafonable expences incurred on the bill were fo much, which the defendant had refufed to pay. And the common money counts.

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In fupport of the undertaking laid in the declaration the plaintiffs, at the trial at *Guildhall*, produced the written engagement figned by the defendant, which was in thefe words; "Meffrs. *Wain* and Co., I will engage to "pay you by ½ paft 4 this day fifty-fix pounds and expences on bill that amount on *Hall*. (Signed) *Jno.* "*Warlters*, (and dated) No. 2, *Cornhill*, *April* 30th, "1803." Whereupon it was objected, on the part of the defendant, that though the promife, which was to pay the debt of another, were *in writing*, as required by the ftatute of frauds, yet that it did not exprefs *the confideration* of the defendant's promife, which was alfo required by the ftatute to be in writing; and that this omiffion could not be fupplied by parol evidence, (which the plaintiffs propofed to call in order to explain the occafion and confideration of giving the note); and that for want of fuch confideration appearing upon the face of the written memorandum, it ftood fimply as an engagement to pay the debt of another without any confideration, and was therefore nudum pactum and void. And Lord *Ellenborough* C. J., upon view of the ftatute of frauds, 29 *Car.* 2. *c.* 3. *f.* 4., which avoids any fpecial promife to anfwer for the debt of another, "unlefs the *agreement* upon which

"the

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"the action shall be brought, or some memorandum or "note thereof, shall be in writing, and signed by the party "to be charged therewith," &c., thought that the term *agreement* imported the substance at least of the terms on which *both* parties consented to contract, and included the *consideration* moving to the promise, as well as the *promise* itself: and the *agreement* in this sense not having been reduced to writing for want of including the *consideration* of the promise, he thought it could not be supplied by parol evidence, which it was the object of the statute to exclude; and therefore nonsuited the plaintiffs. A rule nisi was obtained in the last term for setting aside the nonsuit and granting a new trial, on the ground that the statute only required the *promise* or binding part of the contract to be *in writing*, and that parol evidence might be given of the consideration, which did not go to contradict, but to explain and support the written promise.

Garrow and *Lawes* shewed cause against the rule. The question is simply this, Whether *parol* evidence can be given of an *agreement* which the statute of frauds avoids unless it be *in writing?* The words are "that no action "shall be brought whereby to charge the defendant upon "any special promise to answer for the debt, &c. of ano-"ther person, &c. unless the *agreement* upon which such "action shall be brought, or some memorandum or note "thereof, shall be *in writing*, and signed by the party to "be charged therewith, &c." Now to every *agreement* there must be at least two parties; and, in order to make it available in law, there must be some consideration for it; which necessarily forms part of the agreement itself, being that in respect of which either party consents to be bound. It is no answer to say that the parol evidence

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offered of the consideration, namely, the forbearance to sue *Hall*, did not go to contradict the written promise; it is enough that being part, and a material part, of the *agreement*, it was not reduced to writing and signed by the party to be charged, as required by the statute. The effect of such parol evidence, if admitted, would be to render valid that which, so far as appears by the writing itself, is void in law for want of a consideration; and this would be letting in all the dangers of fraud and perjury, which it was the object of the statute to guard against. Upon the face of the paper the debt appears to be the debt of another; and as a mere promise to pay the debt of another, without any consideration, would before the statute have been void as nudum pactum at common law; so it is not made good by the statute without a consideration in law for entering into such an agreement; which *agreement*, i. e. the whole agreement, or some memorandum or note of the whole, specifying the contracting parties, the consideration, and the promise, must be made in writing. The consideration is an essential part of every executory agreement; and this was altogether executory, on the part at least of the defendant. If the agreement had been declared on as in writing, the mere production of the note would not have proved the consideration of forbearance laid in the declaration; and such consideration could not have been supplied by parol evidence. In *Preston* v. *Merceau* (*a*), where the plaintiff had agreed in writing with the defendant's testator to let him certain premises at a certain rent; parol evidence, tendered to shew that the tenant had agreed to pay a further sum for ground-rent to the ground landlord, was rejected as subversive of the statute of frauds; although it was there

(*a*) 2 *Blac.* 1249.

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contended that the evidence offered did not go to *alter* but to *explain* the agreement. So in *Gunnis* v. *Erhart* (*a*) the verbal declaration of an auctioneer at the time of a sale, that there was a charge on the estate, was deemed inadmissible to contradict the printed conditions, which stated the premises to be free from all incumbrances.

Erskine and *Marryat*, in support of the rule, said that the evidence tendered in the two cases cited went not to explain but to contradict the written agreements; in the one case to increase the quantum of the rent specified, in the other to substract so much as the charge amounted to from the value of the estate which was offered for sale *free from incumbrances*. But here the parol evidence went merely to shew on what occasion the written agreement had been entered into; and it is in common practice to admit parol evidence for such a purpose: it is part of the res gestæ, and no part of the agreement itself, which must in its nature be executory at the time of the writing made. The foundation of the action in this case is not the writing, but the *promise* by the defendant to pay the debt of *Hall*. This before the statute of frauds might have been proved wholly by oral testimony, but since that statute the promise can only be evidenced by writing signed by the party to be charged therewith, or by some other lawfully authorised. It is difficult indeed to account for the introduction of the word *agreement* into the latter part of the clause, which in its strict sense, as compounded of "*aggregatio mentium*, or the union of two or more minds in a thing done or to be done (*b*)," is more properly applicable to the other branches of the clause, namely, "an *agreement* on consideration of marriage, or

(*a*) 1 *H. Blac.* 289. (*b*) 1 *Com. Dig.* 311.

"upon

" upon *contract* or ſale of lands, &c. or upon any *agree-* " *ment* not to be performed within the ſpace of one year, " &c. than to any ſpecial *promiſe* by an executor to an- " ſwer damages out of his own eſtate, or to any ſpecial " *promiſe* to anſwer for the debt, &c. of another." To ſuch *promiſes* the word *agreement* can only be conſidered applicable ſo far as it is ſynonimous to *engagement* or *undertaking*, in which ſenſe it is often uſed in common parlance, and therefore means in this reſpect the agreement or promiſe to pay the debt of another. Beſides, the ſtatute does not require the *whole* agreement to be ſet out in form, but it is ſufficient if there be a *note* or *memorandum* of it in writing; that is, ſo much of the agreement as is obligatory on " the party to be charged therewith." In whatever form of words therefore the *promiſe* is made, which before the ſtatute would have been evidence to bind the party making it under the circumſtances of the caſe, it will, if thoſe words are reduced into writing, ſtill bind him ſince the ſtatute under the like circumſtances. But in either caſe the inducement for making ſuch promiſe, which is part of the res geſtæ, may be evidenced by parol. Thus, ſuppoſe a promiſe in writing to pay the *expences* attending a certain bill drawn by another; parol evidence muſt neceſſarily be let in to ſhew to what bill the promiſe was meant to apply, and how the expences aroſe, and the bill itſelf would be produced. And this would be evidence not to vary, but to corroborate the written promiſe. The 3d, 7th, and 17th ſections of the act all require the ſignature of the party to ſome note in writing in order to charge him with the ſeveral ſubject matters of thoſe ſections. But in all thoſe caſes the party muſt be charged on the ſpecial written *agreement*; but here he is charged on the *promiſe*, of which the writing is only evidence.

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Yet the 4th ſection ſuppoſes that the party is to be charged *upon the agreement*, " unleſs the agreement *upon* " *which* ſuch action ſhall be brought," &c.; which ſhews that *agreement* as there uſed means no more than *undertaking* or *engagement*. And in this ſenſe an *agreement* ſigned by one party only on a ſale by auction was holden ſufficient to charge him within the ſtatute of frauds (*a*). [Lord *Ellenborough* C. J. There it was deemed ſufficient proof of ſuch agreement ſo as to charge the party ſigning it. He was eſtopped by his ſignature from protecting himſelf under the ſtatute. But there the conſideration appeared in writing]. They then obſerved, that though the objection muſt have often before occurred in actions of this ſort, which were in common practice, the word *agreement* had never before received ſuch a conſtruction as applicable to this branch of the clauſe.

Lord ELLENBOROUGH C. J. after noticing the definition of the word *agreement* by Ld. C. B. *Comyns*, who conſidered it as a thing to which there muſt be the aſſent of two or more minds, and which, he ſays, ought to be ſo certain and complete that each party may have an action upon it; for which, in addition to the author's own authority, was cited that of *Plowden*; and better (his Lordſhip obſerved) could not be cited:

In all caſes where by long habitual conſtruction the words of a ſtatute have not received a peculiar interpretation, ſuch as they will allow of, I am always inclined to give to them their natural ordinary ſignification. The clauſe in queſtion in the ſtatute of frauds has the word *agreement*, (" unleſs the *agreement* upon which the action " is brought, or ſome memorandum or note thereof ſhall

(*a*) *Seton* v. *Slade*, 7 *Veſ. jun.* 265.

" be

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" be in writing," &c.) And the queſtion is, Whether that word is to be underſtood in the looſe incorrect ſenſe in which it may ſometimes be uſed, as ſynonimous to *promiſe* or *undertaking*, or in its more proper and correct ſenſe, as ſignifying a mutual contract on conſideration between two or more parties? The latter appears to me to be the legal conſtruction of the word, to which we are bound to give its proper effect; the more ſo when it is conſidered by whom that ſtatute is ſaid to have been drawn, by Lord *Hale* (*a*), one of the greateſt Judges who ever ſat in *Weſtminſter-hall*, who was as competent to expreſs as he was able to conceive the proviſions beſt calculated for carrying into effect the purpoſes of that law. The perſon to be charged for the debt of another is to be charged, in the form of the proceeding againſt him, upon his ſpecial *promiſe*; but without a legal conſideration to ſuſtain it, that promiſe would be nudum pactum as to him. The ſtatute never meant to enforce any promiſe which was before invalid merely becauſe it was put in writing. The obligatory part is indeed the *promiſe*, which will account for the word *promiſe* being uſed in the firſt part of the clauſe, but ſtill in order to charge the party making it, the ſtatute proceeds to require that the *agreement*, by which muſt be underſtood *the agreement in reſpect of which the promiſe was made*, muſt be reduced into writing. And indeed it ſeems neceſſary for effectuating the object of the ſtatute that the conſideration ſhould be ſet down in writing as well as the promiſe; for otherwiſe the conſideration might be illegal, or the promiſe might have been made upon a condition precedent, which the party

(*a*) Lord *Mansfield* expreſſed a doubt of this in *Wyndham* v. *Chetwynd*, 1 *Burr.* 418. any otherwiſe perhaps than by Lord *Hale*'s having left ſome looſe notes behind him, which were afterwards unſkilfully digeſted, 1 *Blac.* 99.

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charged may not afterwards be able to prove, the omiſſion of which would materially vary the promiſe, by turning that into an abſolute promiſe which was only a conditional one: and then it would reſt altogether on the conſcience of the witneſs to aſſign another conſideration in the one caſe, or to drop the condition in the other, and thus to introduce the very frauds and perjuries which it was the object of the act to exclude, by requiring that the *agreement* ſhould be reduced into writing, by which the conſideration as well as the promiſe would be rendered certain. The authorities referred to by *Comyns*, *Plowd.* 5. *a.* 6. *a.* 9., to which may be added *Dyer*, 336. *b.* all ſhew that the word *agreement* is not ſatisfied unleſs there be a conſideration, which conſideration forming part of the agreement ought therefore to have been ſhewn; and the promiſe is not binding by the ſtatute unleſs the conſideration which forms part of the agreement be alſo ſtated in writing. Without this, we ſhall leave the witneſs whoſe memory or conſcience is to be refreſhed to ſupply a conſideration more eaſy of proof, or more capable of ſuſtaining the promiſe declared on. Finding therefore the word *agreement* in the ſtatute, which appears to be moſt apt and proper to expreſs that which the policy of the law ſeems to require, and finding no caſe in which the proper meaning of it has been relaxed, the beſt conſtruction which we can make of the clauſe is to give its proper and legal meaning to every word of it.

GROSE J. It is ſaid that the parol evidence tendered does not contradict the agreement; but the queſtion is, Whether the ſtatute does not require that the conſideration for the promiſe ſhould be in writing as well as the promiſe itſelf? Now the words of the ſtatute are " that

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no action ſhall be brought whereby to charge the defendant upon any ſpecial promiſe to anſwer for the debt, &c. of another perſon, &c. unleſs the *agreement* upon which ſuch action ſhall be brought, or ſome memorandum or note thereof, ſhall be in writing," &c. What is required to be in writing, therefore, is the *agreement*, (not the promiſe, as mentioned in the firſt part of the clauſe,) or ſome *note or memorandum of the agreement*. Now the *agreement* is that which is to ſhew what *each party* is to do or perform, and by which *both parties* are to be bound; and *this* is required to be *in writing*. If it were only neceſſary to ſhew what *one* of them was to do, it would be ſufficient to ſtate the *promiſe* made by the defendant who was to be charged upon it. But if we were to adopt this conſtruction it would be the means of letting in thoſe very frauds and perjuries which it was the object of the ſtatute to prevent. For without the parol evidence the defendant cannot be charged upon the written contract for want of a conſideration in law to ſupport it. The effect of the parol evidence then is to make him liable: and thus he would be charged with the debt of another by parol teſtimony, when the ſtatute was paſſed with the very intent of avoiding ſuch a charge, by requiring that the *agreement*, by which muſt be underſtood the *whole agreement*, ſhould be in writing.

LAWRENCE J. From the looſe manner in which the clauſe is worded, I at firſt entertained ſome doubt upon the queſtion; but upon further conſideration I agree with my Lord and my Brothers upon their conſtruction of it. If the queſtion had ariſen merely on the firſt part of the clauſe, I conceive that it would only have been neceſſary that the *promiſe* ſhould have been ſtated in writing; but

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it goes on to direct that no perſon ſhall be charged on ſuch *promiſe* unleſs the *agreement*, or ſome *note or memorandum thereof*, that is, *of the agreement*, be in writing; which ſhews that the word *agreement* was meant to be uſed in a ſenſe different from *promiſe*, and that ſomething beſides the mere promiſe was required to be ſtated. And as the conſideration for the promiſe is part of the agreement, that ought alſo to be ſtated in writing.

LE BLANC J. If there be a diſtinction between *agreement* and *promiſe*, I think that we muſt take it that *agreement* includes *the conſideration* for the promiſe as well as *the promiſe* itſelf: and I think it is the ſafer method to adopt the ſtrict conſtruction of the words in this caſe, becauſe it is better calculated to effectuate the intention of the act, which was to prevent frauds and perjuries, by requiring written evidence of what the parties meant to be bound by. I ſhould have been as well ſatisfied, however, if, recurring to the words uſed in the firſt part of the clauſe, they had uſed the ſame words again in the latter part, and ſaid, " unleſs *the promiſe* or *agreement* upon which the action is brought, or ſome note or memorandum thereof, ſhall be in writing." But not having ſo done, I think we muſt adhere to the ſtrict interpretation of the word *agreement*, which means the *conſideration* for which as well as the *promiſe* by which the party binds himſelf.

Rule diſcharged.

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BAINBRIGGE *against* HOULTON and Another.

Saturday, April 21st.

Affidavits in support of or in answer to a rule for setting aside an award made a rule of court under the stat. 9 & 10 *W*. 3. c. 15. *s*. 1. there being no action previously brought, nor any cause in court, need not be entitled.

UPON shewing cause against a rule which had been obtained on the part of *Bainbrigge*, calling on *Houlton* and another to shew cause why the award which had been made in their favour, and the submission to which had been made a rule of Court under the stat. 9 & 10 *W*. 3. *c*. 15. *s*. 1. (without any action brought) should not be set aside, objection was taken by *Garrow* and *East* to the affidavit of one of the arbitrators made in answer to the rule, that it was not *entitled* at all, which it ought to be after a rule nisi granted.

Erskine, *Balguy*, and *Clarke*, who shewed cause against the rule, contended that this was not necessary in a case like the present, where there was no action brought, and consequently no cause in court. And

The Court, after consulting the Master, held that it was not necessary in this case that the affidavit either in support of or in answer to the rule should be entitled (*a*). And after hearing the affidavit, they

Discharged the Rule.

(*a*) The like was ruled in another similar case in this term. But where an *attachment* is applied for, for non-performance of the award, the affidavits in answer to the rule must be entitled *The King* v. ——; though those upon which the rule was obtained need not be entitled, where there was no cause previously in court. *Bevan* v. *Bevan*, 3 *Term Rep*. 601. But where the reference arises from an order of Nisi Prius, there being then a cause in court, the affidavits either for a rule to set aside the award, or for an attachment for non-performance of it, are entitled in the cause. But after the rule nisi granted for an attachment, the affidavits in answer to such rule must be entitled *The King* against ——.

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Monday, April 23d.

WILLIS *against* The Commissioners of Appeals in Prize Causes.

The Prize Court of Appeals has jurisdiction to decree that one who was co-agent of the captors, in whose hands the proceeds of the prize after condemnation and sale were placed, should, after a decree of restitution with interest pronounced against the captors, pay *interest* on such proceeds while in his hands to the claimant. And this Court will not grant a prohibition to the Prize Court to restrain it from executing such decree, either on the ground that it did not appear on the proceedings below that the agent was a *registered* agent under the stat. 33 *Geo.* 3. *c.* 66; because that Court has original jurisdiction *in rem* and its incidents, independent of the statute; nor on the ground that the Court below were restrained by the 32d clause of the act from decreeing restitution of more than the *net proceeds* of the sale awarded upon condemnation; because *interest* made of such *net proceeds* in the hands of the holder are to be deemed part of the proceeds; nor on the ground that it was not alleged that *interest* had *in fact* been made by such agent; because that was a fact for the Court below to decide upon, and they must be presumed to have decided on satisfactory evidence.

UPON a rule to shew cause why a prohibition should not go to the commissioners of appeals in prize causes, to prohibit them for proceeding further against Mr. *John Willis*, upon whom as prize agent in a certain cause an order had been made for the payment of interest on the proceeds of a certain prize which had come to his hands, the suggestion stated that in *June* 1798, pending hostilities between *Great Britain* and *France*, Capt. *West* of his Majesty's ship *Tourterelle* had made prize in the *West Indies* of the ship *Polly* and her cargo, as *French* property, and had carried the same into *Port Royal* in the island of *Jamaica*, within the jurisdiction of the Vice-Admiralty Court there, in which Court she was libelled as prize, and condemnation prayed. That upon monition issued certain claims were interposed on behalf of different sets of owners, *British* subjects, some of which were allowed, and such parts of the cargo were acquitted, and restitution awarded; and the remainder of the cargo was adjudged good and lawful prize; and that the same should be forthwith sold by the agents of the captors, and the sale-money be distributed amongst the captors, &c.

From which sentence of condemnation the claimant appealed, which appeal was allowed on the usual terms. And thereupon it was further ordered by the Court, that a warrant of appraisement should issue to value and ap-

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praise the several goods condemned, and upon the return of the said appraisement that the agent for the captors *should enter into good and sufficient security to account for and pay over the net proceeds thereof, and also the amount of the specie condemned as aforesaid, as that Court should thereafter direct in case the sentence appealed from should be reversed.* That the captors appointed *B. Waterhouse* of the island of *Jamaica*, merchant, to be their agent for and relating to the said prize: and that he had duly and within the limited time exhibited and registered in the said Vice-Admiralty Court his letters of attorney, appointing him agent for the purposes aforesaid, according to the form of the statute. That at the return of the said appraisement such security as aforesaid was duly entered into by two good and sufficient sureties on behalf of the captors, to answer the said appeal. That the goods condemned were, on the 20th of *September* 1798, sold by public auction, pursuant to the statute, and netted, after payment of all expences, 4552 *l.* 1 *s.* 7 *d.* That an appeal was afterwards made to the commissioners, &c., who on the 29th of *June* 1801 reversed the decree of condemnation, and retained the claim for the general cargo, and decreed the same to be restored, or the value thereof paid to the claimant for the use of the owners: and assigned the said captors to bring in the account sales of the same on oath, and the proceeds thereof within a month; which account sales and proceeds were afterwards duly brought in accordingly: and *condemned the captors in interest from the time of the sale of the said general cargo,* and in the costs of the then hearing. That on the 4th of *August* 1802 the commissioners of appeals, at the petition of the claimant, decreed a monition against *J. Willis* and *B. Waterhouse, as the captor's agents,* to appear before the commissioners,

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and *shew cause why they should not pay interest upon the said proceeds.* And on the 14th of *July* 1803, *J. Willis* being monished, appeared in the said court of appeals, holden before the Right Hon. the Earl of *Rosslyn*, Sir *William Grant* Kt., Sir *William Wynne* Kt., Sir *William Scott* Kt., and others, and shewed cause, as required; and although the said *J. Willis* was not any party to the said suit, appeal, and proceedings, or any of them, or in any way concerned or interested in the adjudication of the said prize, nor connected therewith *otherwise than* as being the general partner in trade with the said *B. Waterhouse*, the agent of the captors as aforesaid; and although the said monition was founded on no special or other suggestion on the part of the claimant, than that *J. Willis* and *B. Waterhouse* were the agents for the captors; and although *J. Willis* was not by law, nor ought to be subject to the payment of interest on such proceeds in consequence of that character; and although *J. Willis* and *B. Waterhouse*, or either of them, never were in any manner called upon prior to the determination of the said appeal by the said court of appeal as aforesaid to pay over the said proceeds or any part thereof, and the same or any part thereof never were or was improperly withheld from the jurisdiction of that court, or of the said Court of Vice-Admiralty, or from the party entitled to the possession thereof; and although the said general cargo, having been so condemned at *Jamaica*, became vested in the captors upon bail being given to answer the said appeal as aforesaid, and was accordingly sold by *B. Waterhouse*, the acting agent of the captors, who having collected the proceeds of such sale, after payment of the expences, continued to hold the same as an agent or banker usually holds monies committed to his care or custody, and liable

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to be called for at any moment, (that is to ſay) involved and mixed with other monies then alſo entruſted to him and held in depoſit or otherwiſe; no judicial or other order having been made or given by any court or by the captors for veſting or laying out the proceeds at intereſt or for otherwiſe diſpoſing of the ſame with a view to make a profit thereof; and whereas no ſpecial application, inveſtment, or diſpoſal of the ſame was ever made for the uſe or benefit of the captors or any of them, or of *J. Willis* and *B. Waterhouſe*, or either of them, and no ſpecific profit or advantage which could be ſet forth or aſcertained had at any time been derived therefrom; and although as ſoon as the decree of reſtitution was made known to *B. Waterhouſe*, he immediately cauſed the ſaid proceeds to be paid to his Majeſty's proctor, who brought the ſame into the regiſtry of the court of appeals on the part of the captors, and *J. Willis* never had any power, cuſtody, control, or management over the proceeds, or any part thereof, but the ſame remained with *B. Waterhouſe* in *Jamaica* in manner aforeſaid; and although the Lords Commiſſioners had no juriſdiction or authority whatſoever by the laws of this realm to condemn *J. Willis* to pay intereſt on the ſaid proceeds, or any proceeds of the ſaid general cargo, nor to enforce him to pay the ſame; and although *J. Willis* inſiſted upon all the premiſes before the Commiſſioners of Appeals, and offered to verify the ſame, yet they refuſed to admit the ſame, and decreed intereſt to be paid by *J. Willis* upon the proceeds of the ſaid general cargo from the time of the ſale thereof.

The rule was obtained in the laſt term, on the ground that the act of the 33 *Geo.* 3. *c.* 66. (*ſ.* 23, 24. 28. 32.) which regulated matters of prize and prize agents, gave

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no authority to the prize courts in this case to decree interest to be paid by prize agents, and that no such authority was given by any other statute or law.

Gibbs and *Steven* shewed cause against the rule. This being after the order of the Court of Appeals made, the only ground for a prohibition must be the want of jurisdiction in the Commissioners to make it. But, first, supposing that that Court had no jurisdiction over prize agents whose powers of attorney were not registered under the 51st section of the stat. 33 *Geo.* 3. *c.* 66., still it was a question of fact, Whether Mr. *Willis* were or were not a registered agent? which it was competent for the Court below to decide; and after sentence it must be presumed, if necessary, that the affirmative was proved; and that conclusion, if unfounded, can only be questioned in a court of appeal. All such agents are, by the 59th section, required to *account* in the Court of Admiralty before the distribution of the prize money, and that Court is to confirm or disallow the accounts upon objections stated, and "to make such further order touching the said accounts as the case may require." This would give jurisdiction to the court of prize on appeal to direct the allowance of interest, if it thought fit; there being no negative words to restrain the general authority before given in this respect. It is not even objected by the suggestion that the Court of Appeals had no jurisdiction to compel *Waterhouse*, the registered agent, to pay interest: but *Willis*'s case is endeavoured to be distinguished from his, as not being the agent of the captors, which nevertheless is in effect admitted by a negative pregnant; for it is alleged "that *Willis* was not party to the proceedings, or interested in the adjudication of the prize, nor connected therewith

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otherwise than as being the general partner in trade with *Waterhouse*;" which shews that the question made before the Court of Appeals was as to the fact of *Willis*'s agency. This was the very point decided by the Lord Chancellor in the case of the *Danish* ship *Noysomhed* (*a*). There a cargo condemned as prize by the Vice-Admiralty Court at *Tortola* was sent to *Chorley* at *Liverpool*, and sold by him for the benefit of the captors. Afterwards the Court of Appeal reversed the sentence and decreed restoration, and that the captors should bring in an account of the proceeds within a month; under which a monition issued against *Chorley*; who moved for a prohibition on the ground that the property was consigned to him, *not as prize agent*, *but as a general merchant*, and that he had since accounted for the proceeds to the consignors. But the Lord Chancellor thought that a question proper for the Court of Admiralty to decide, as incidental to the principal question of prize; and that therefore he was not authorized to grant a prohibition. They also observed that the only affidavit made in support of the suggestion was to verify the proceedings in the prize court, and therefore it was irregular to introduce any extraneous fact into the suggestion, such as that *Willis* was not a co-agent with *Waterhouse*, if that were now to be insisted on. But, 2dly, The Court of Appeals has a general jurisdiction *in rem* in matters of prize, independent of the stat. 33 *Geo.* 3.; and may follow the prize or its proceeds into whatever hands they may get, and compel the holder to account for those proceeds: and it is to be presumed after decree that *Willis* was proved before the Court of Appeals to have made interest of the prize money in his hands, in whatever character it came to him; and then the

(*a*) 7 *Ves. jun.* 593.

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Court, which has jurisdiction over the principal, has jurisdiction also over all its incidents, one of which is interest; and such interest, when proved to be made, is part of the *proceeds* of the prize, and may therefore be directed to be paid over. In *Smart* v. *Wolfe* (*a*), *Buller* J. said, that every case which he knew on the subject was a clear authority to shew that questions of prize and their consequences were solely and exclusively of the Admiralty jurisdiction. And that after the cases of *Lindo* v. *Rodney* (*b*), *Le Caux* v. *Eden* (*c*), and *Livingston* v. *M'Kenzie* (*d*), it would only be a waste of time to enter into reasons to shew that this Court has no jurisdiction over those subjects. [Lord *Ellenborough* C. J. There is no doubt but that a prohibition will go to a Prize Court, if it clearly exceed its jurisdiction. If we do not grant prohibitions in matters of prize, it is because of the objection arising out of the subject-matter, and not in respect of the Court. The question made by the plaintiff's counsel was upon the act of parliament, Whether the Court of Appeals had jurisdiction to grant interest? or whether it be not restricted to the *net proceeds* in any decree for restitution against the captors or their agents, according to the provisions of the 32d section?] That section meant merely to provide a rule for estimating the value of the prize itself at the time of the sale, the net proceeds of which it directs shall be deemed and taken to be the *full* value of the prize. But that does not restrain the general authority of the Court, to which the statute was only auxiliary.

Erskine, *Park*, and *Richardson*, in support of the rule. This is the first instance of interest decreed to be paid

(*a*) 3 *Term Rep.* 344.
(*b*) *Dougl.* 591. n. 1.
(*c*) *Ib.* 572.
(*d*) 3 *Term Rep.* 332, 3.

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upon prize money, except against the captors themselves, and that by way of punishment for misconduct. In *Le Caux* v. *Eden* (*a*) the Court of Admiralty condemned the captor in *damages* as well as costs. [*Lawrence* J. If it be admitted that that Court may condemn the captors in interest by way of damages, is it not matter of fact whether the agents have that interest in their hands which has been awarded?] Then the decree of interest should have been against the captors: but after the decree against them, condemning them in interest, a monition has issued against *Willis*, a third person, calling upon him to shew cause why he, together with *Waterhouse*, should not pay interest upon the proceeds as the captors' agents, which the captors had been before decreed to pay. But the stat. 33 *Geo.* 3., which gives jurisdiction to the Admiralty Court over the captors' agents, has provided expressly (*s.* 32.) that "in case sentence shall be finally reversed, "after sale of any ship or goods pursuant to the directions in this act contained, the *net proceeds* of such sale "(after payment of all expences attending the same) *shall* "*be deemed* and taken to be the *full value* of such ship and "goods, and that the parties appellate and their securities "*shall not be answerable* for the value *beyond the amount of* "*such net proceeds*, unless it shall appear that such sale "was fraudulent or without due care." The 28th section had before provided "that the execution of any sen-"tence appealed from shall not be suspended in case the "parties appellate shall give security to restore the *ship*, "&c. *or effects* or the *full value* thereof, in case the sen-"tence should be reversed." The bail, therefore, are put in the place of the thing itself; and the act of parliament has declared what shall be deemed the full value of the

(*a*) Doug. 591. n. 1.

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thing, viz. the *net proceeds*, and that the parties ſhall not be anſwerable *beyond* ſuch net proceeds. Admitting, therefore, that the Admiralty Court has an original juriſdiction *in rem*, yet here the ſtatute has ſubſtituted the *net proceeds* pro re. [Lord *Ellenborough* C. J. The act has only ſaid that they ſhall not be liable for the value of the thing itſelf beyond the net proceeds of the ſale; but it does not ſay that they ſhall not be liable for the beneficial uſe or product which they make of that value while in their hands.] The form of the ſecurity is given in a note to *Brymer* v. *Atkins* (*a*), and it is conditioned to *reſtore* the ſhip and cargo, or the *value* thereof, in caſe the ſentence ſhould be reverſed. Since this tranſaction took place more extenſive powers have been conferred by the ſtat. 43 *Geo.* 3. *c.* 160.; *ſ.* 50. of which requires agents, on regiſtering their letters of attorney, to give ſecurity in 5000*l.* to the Court for the due execution of their truſt in all matters of prize agency; and *ſ.* 62., looking as it were to the very caſe of making intereſt of prize money, has empowered the Judge of the Court whoſe ſentence is appealed from "to aſſign the agents, or other perſons in "whoſe hands the proceeds of the prize may have come, "at the prayer of either party, to bring into and leave in "the regiſtry the net proceeds of the ſales of ſuch prize, "&c. which ſhall be depoſited in the Bank of *England*, "or in caſe the parties ſhall agree thereto, in ſome public "ſecurities at intereſt," &c. Even this proviſion is ſhort of what is now contended for; for it only provides for making intereſt in future, at the prayer of either party, from the time of appealing; whereas the Court of Appeals has aſſumed to give intereſt as from the time of the ſale by a collateral and ſubſequent proceeding; and that

(*a*) 1 *H. Blac.* 194.

too

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too without any allegation that interest had been made by the agent, decreed to pay it. The Court of Appeals was functus officio after the decree against the captors, unless there were some new proceeding originated against the agents, nothing of which is suggested. But interest is either something arising out of a contract of lending, or something given by way of damages for misconduct. Now as a *contract*, the prize court could have no jurisdiction over it; and indeed no contract can be presumed between the agents of the captors and the captured, at whose prayer the monition issued. And as a punishment, the prize courts only give damages for the misconduct of the captors, in making the capture, to which their agents, as such, can be no parties; neither is any misconduct imputed to them. [*Grose* J. I consider the interest to have been given as part of the *proceeds* of the prize. Lord *Ellenborough* C. J. We must presume that interest has been given upon the best ground; namely, upon proof that the agents made interest of the proceeds of the prize in their hands; and then it cannot be considered as given by way of *punishment*.] Then the maxim applies respondeat superior (*a*). But the interest cannot be considered as *proceeds*; for the proceeds were before decreed to be brought into court by the captors, which it is alleged has been done. Then with respect to this application coming after sentence; no objection arises on the final sentence, but on this collateral order; and therefore the application was made as soon as the grievance existed. And in *Gare* v. *Gapper* (*b*) the Court directed the plaintiff to declare in prohibition, which is still pending, in order to have the question well considered, whether if the ecclesi-

(*a*) *Sadler* v. *Evans*, 4 *Burr.* 1985. (*b*) 3 *East.* 480.

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aſtical court miſconſtrue an act of parliament a prohibition will not lie even after ſentence.

Lord ELLENBOROUGH C. J. This prohibition is applied for on a ſuppoſed want of juriſdiction in the Court of Appeals to decree intereſt to be paid by prize agents on the proceeds of a cargo in their hands from the time of the ſale under a prior ſentence of condemnation as prize. It is clear that that Court has juriſdiction *in rem*, and may take into its poſſeſſion the thing itſelf or the proceeds wherever they may be found, either in the hands of the principal captor, or agent, or of any other who has no lawful title to hold them. Here the agents have been fixed with the proceeds. It is, however, objected that intereſt derived out of thoſe proceeds cannot be decreed. It is not diſputed but that intereſt may be decreed againſt the captors; but not, as it is urged, againſt an agent; becauſe he is only reſponſible on his ſecurity for the amount of the *net proceeds* of the ſale, and that even as againſt the captors themſelves it is only given by way of damages for miſconduct, for which the agent is not anſwerable. To be ſure the decree of intereſt cannot be brought forward here as matter of *puniſhment* againſt the agent, againſt whom there is no ſubſtantive charge of miſconduct. Neither is it brought forward as on the ground of *contract*; but ſimply on the ground that the *res*, the proceeds, have got into the hands of the agents, and have there grown and accumulated, producing the intereſt now ſought to be recovered. In many inſtances it happens that one who has got the fund of another in his hands, and is proved to have made intereſt of it, ſhall be reſponſible in equity for ſuch increaſe. Then it is ſaid that no intereſt appears to have been made of the proceeds by the agents.

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But we muſt give credit to the Court below for having exercifed its jurifdiction foundly, and that it was fufficiently proved to it that intereſt had been made. And though it may be a new proceeding in theſe courts to compel an agent, who has made intereſt of the proceeds of a prize in his hands, to render it to thoſe to whom it is due, it is high time that it ſhould be done. For it would be an enormous defect of juſtice when the captor is liable, on the reverſal of a ſentence of condemnation, to be called upon to render intereſt who has not had the proceeds in his hands in the interval, that the agent who has held them, and has derived all the benefit, ſhould not be anſwerable. I am therefore clear upon principle, that though the parties appellate and their ſureties be only made liable under the 32d ſection of the act for the value of the prize to the extent of the net proceeds of the ſale, yet that the captors are liable for intereſt upon ſuch net proceeds, and ſo are their agents and thoſe into whoſe hands the res or proceeds have come. It does not appear here that the agents have not made intereſt of the money in their hands, and we muſt conclude that the Court of Appeals was properly ſatisfied that they had. The only queſtion for us to conſider is, Whether intereſt is to be deemed part of the res or proceeds in the hands of an agent? which I am ſatisfied that it may well be.

GROSE J. It is admitted that the Court of Appeals had jurifdiction over the *rem*, and every thing incident to it. The law is clear, as laid down by Mr. Juſtice *Buller* in the caſe referred to of *Smart* v. *Wolff* (*a*), that the Admiralty Court has juriſdiction, not only over the queſtion

(*a*) 3 *Term Rep.* 345, &c.

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of prize, but of all its consequences: and that though it has taken a stipulation, it is not confined to proceed on that alone, but may also proceed *in rem* according to its ancient course. Then what is the *res?* The prize or what it produces: *interest* is part of the res; it is an incident to it. It is clear that the Prize Court has jurisdiction over what the act calls the *proceeds;* and money is the proceeds, and interest is the product of money and part of the proceeds. I am glad to find the provision referred to in the late act of parliament for directing the proceeds to be laid out in public securities: not that it furnishes any doubt of the power of the Court to decree interest before; but because it secures the claimant's money, as it was intended to do, against the insolvency and mismanagement of agents. But it is said that *Willis*, not being a registered agent, was not within the jurisdiction of the Court: but he had the proceeds of the prize, the money, in his hands, and that Court had jurisdiction over him, as it had over the money. Then it is urged that *interest* is treated as distinct from the *proceeds* in the suggestion: but the *proceeds* decreed by the Court to be brought in meant the proceeds as they existed at the time of the sale of the cargo: and the *interest* is what was made afterwards, and which afterwards increased the amount of those proceeds. Then if the captor be liable to interest beyond the original proceeds, so is the agent who has received them into his hands.

Lawrence J. It is supposed that the prize court has jurisdiction over the agent only under the prize acts; but that is not so: for if those acts had never been passed that Court would have had jurisdiction over the *res*, and the proceeds of it, into whosever hands they get. The question then is, Whether *interest* be not a part of the proceeds?

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ceeds? which I take it clearly to be. But it is said that by the 32d section of the stat. 33 *Geo.* 3. the parties shall not be liable, in case of the reversal of a sentence of condemnation, beyond the *net value* of the proceeds *at the time of the sale* of the prize. The meaning, however, of that section was that the captors should not be charged with the value of the prize beyond the amount of what it *then* produced. But that does not shew that if the proceeds, of whatever given value at the time of the sale, be afterwards made productive, the parties in whose hands they are shall not be liable for that product. Then it is said further, that interest is not alleged to have been made. But in *Smart* v. *Wolffe*, upon a suggestion that the party decreed to bring in the produce had not the proceeds, Mr. Justice *Buller* said that if such were the fact, it should have been pleaded below. So here, if the agents had not made interest of the money in their hands, they should have insisted on it below. They do not, however, even now, suggest that no interest was made by them; they only argue that as *Waterhouse* only held the proceeds "as an *agent* or *banker* usually holds monies committed to his care, and liable to be called for at any moment, that is to say, mixed with other monies also entrusted to him, and held in deposit or otherwise," therefore they ought not to be liable to pay interest. It is, therefore, rather an admission that interest was made. And it does not signify how it was made if made in fact. It is an accretion to the principal proceeds. If the agents had shewn to the Court below that they had put the prize-money in a chest and had made no interest of it, I do not say that the Court ought to have decreed them to pay it. It has not been decreed against them as a punishment for misconduct; for then there should have been a substantive

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charge of ſuch miſconduct; neither is intereſt directed to be paid on the ground of any ſuppoſed contract, but merely as part of the proceeds. And as to the objection that it is not formally alleged that intereſt was made by the agents, we cannot ſay how far the practice of the prize court may require ſuch an allegation: it is the beſt judge of the regularity of its own proceedings. It is enough for us that it has juriſdiction to decree intereſt in this caſe. And there is the leſs reaſon to direct the plaintiff to declare in prohibition for the purpoſe of conſidering the queſtion more fully, becauſe if he be not ſatisfied with our opinion, he is not eſtopped from taking that of other courts in *Weſtminſter Hall.*

LE BLANC J. It is admitted that *Willis* and *Waterhouſe* are, or *Willis* alone is, ſubject to the ordinary juriſdiction of the prize court, as being parties in whoſe poſſeſſion the *res* is. Then, in order to ground the application for a prohibition it ſhould appear either that they are called upon for ſomething beyond the *rem*, or that the juriſdiction of the prize court is limited in this reſpect by the act of parliament. And it is contended that even if intereſt were ſhewn to have been made by the agent he would not be liable; becauſe, as it is ſaid, admitting the agent to be liable for the proceeds in his hands, the act of parliament has defined what thoſe proceeds are, namely, *the net proceeds of the ſale at the time.* Then taking the agent to have made intereſt of theſe net proceeds, the queſtion is, Whether he be liable to account for it as part of ſuch proceeds? The object of the 32d clauſe was to lay down a certain rule for aſcertaining the full value of the prize to be reimburſed to the claimant in caſe ſentence of condemnation ſhould be finally reverſed

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after a sale had been directed pursuant to the act; for which purpose it provides that the *net proceeds* of such sale shall be deemed and taken to be *the full value* of the prize, and that the parties appellate and their securities *shall not be answerable for the value beyond the amount of such net proceeds*. But the evident meaning of that is, that the original value of the prize shall not be estimated beyond what it actually produced at the time of the sale under the act. The *proceeds* then are that which was then made, together with that which has been since made out of those proceeds. We cannot enter into the question whether or not the agent has made interest of the money in his hands; but according to what is stated, it is rather to be collected that he had: because the objections made by *Willis* is, not that no interest was in fact made by him and his co-agent *Waterhouse*, but that he was not by law subject to the payment of interest on the proceeds in their hands in consequence of their character as agents; and that the property of the cargo after condemnation was vested by law in the captors, upon bail being given to answer the appeal; and the proceeds collected by *Waterhouse* as their acting agent was holden by him as a banker, &c., and that there was no *special* investment of the amount for the use of the captors, and no *specific* profit which could be set forth had been derived therefrom. But the same might be said by any banker in whose hands money is deposited, and which is mixed with the general mass of his property. Then taking interest to have been made, I consider it as composing part of the *proceeds* at the time when the agent was admonished; for I consider the *proceeds* as including interest made of the net amount of the sale from the time when it is received by the agent till he is called upon to pay it. The object of the provision

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stated from the stat. 43 *Geo.* 3. was not to enable the Court to direct the payment of interest, but to take the principal entirely out of the hands of the agent, and place it on security where it would necessarily produce interest; clearly looking to the event that the agent might become insolvent before a decree of restitution could be had. Considering, therefore, that the agent here was liable for the *proceeds* of the prize; that those proceeds are composed of the original net sum for which the prize sold, together with the interest which has been made of it while remaining in the agent's hands till called for; and that the Court below had jurisdiction to decide whether or not interest should be paid by such agent; and they having decided that it shall; there is no ground for a prohibition.

Rule discharged.

Monday, April 24th.

Ex parte JOHN LANDSDOWN.

The Court will not, at the prayer of the master, grant a habeas corpus to bring up an apprentice impressed, he being willing to enter into the king's service

MARRYAT moved for a writ of habeas corpus to bring up the body of *John Landsdown*, an apprentice (one who was protected from being impressed by the statute 13 *Geo.* 2. *c.* 17.) who had been impressed and taken on board one of the king's ships. But he stated that this application was made on behalf of the master; the apprentice himself being willing to enter into the king's service.

Lord ELLENBOROUGH C. J. The writ of habeas corpus is for the protection of the personal liberty of the subject. If the party himself, being of competent years of discretion, do not complain, we cannot issue the writ on

on the prayer of the master, who has his remedy by action if his apprentice have been improperly taken from him (*a*). 1804. Ex parte JOHN LANDSDOWN.

The other Judges concurred, and two of them observed that of late years similar applications had been repeatedly refused to be granted.

Writ denied.

(*a*) *Eades* v. *Vandeput*, *M.* 25 *Geo.* 3. *B. R.*—This was an action against the captain of a ship of war by the master of an apprentice, to recover wages for the service of his apprentice, who, having been impressed, was detained on board the defendant's ship. The only witness to charge Captain *Vandeput* with knowledge was the apprentice boy himself, who swore that after he had been impressed and carried on board the ship he told the defendant, the captain, that he was an apprentice, and required his discharge, which was refused. The plaintiff having recovered a verdict before *Buller* J. at the sittings after the last term at *Guildhall*,

Erskine moved for a new trial, grounded on affidavits of Captains *Vandeput* and *Ormsby* of the navy, which stated that, according to the custom of the navy, if an apprentice be pressed he must send his indentures to the Admiralty, or bring evidence of them to the captain of the vessel on board of which he is taken. And here he observed that the boy had never shewn his indentures; and that if a captain were to discharge a boy on his bare word that he was an apprentice, every boy on board his ship when he was tired of the service would make that excuse.

The Court, however, were of opinion that the evidence was sufficient, and that the captain ought to have made inquiry into the truth of what the boy said; for after that information he detained him at his peril; and it was admitted that if the indentures had been produced the defendant would have been bound to have discharged the boy.

Rule refused.

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…who is resi-…t on an estate …nted to him …lives, in con-…erat on of two …ineas fine and … rent, cannot … removed …erefrom tho' …ually charge-…le. But semble … cannot gain a …ttlement by 40 …ys' reside ce …on his own …are under the …t. 9 *Geo.* 1, … consideration …ing under 30*l*.

The KING *against* The Inhabitants of MARTLEY.

TWO justices by an order removed *Wm. Barton*, his wife, and children, by name, from the parish of *Doddenham* to the parish of *Martley*, both in the county of *Worcester*. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case. On the 25th of *November* 1754 the dean and chapter of *Worcester* granted to *Henry Barton* of *Doddenham*, labourer, (the grandfather of the pauper), a lease of a cottage and garden, called *Agberrow Close*, in *Doddenham*, containing by estimation about half an acre, then in his occupation, to hold to him, his heirs, and assigns, for his own life (he being then 61 years old), the life of his son *Thomas*, aged 18, and the life of his daughter *Susanna*, aged 16, at the yearly rent of 2*s*. 6*d*. Upon these premises *H. Barton* resided till his death, paying to the dean and chapter the yearly rent of 2*s*. 6*d*.; and at his death, leaving no will, he was succeeded in possession by his eldest son *W. Barton*, the pauper's father; who, on the 22d of *July* 1784, died, leaving a will, by which he devised the premises to his wife for life, remainder to *W. Barton*, the pauper. At the time of his father's death the pauper resided in another parish, and continued so resident for about two years afterwards, during which time his father's widow resided on the premises. At the end of the two years the pauper came to reside with his mother on the premises in question, and continued as part of her family till the 2d of *February* 1790, when the pauper having married, his mother demised the premises to him for her life, at the yearly rent of 1*l*. 11*s*. 6*d*. and went

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to reside elsewhere, leaving the pauper in the sole occupation of the premises. *T. Barton*, the second life named in the lease, died on the 27th of *August* 1795. On the 13th of *July* 1798 the mother of the pauper, who was the tenant for life under the will of the pauper's father, died. The pauper having continued in possession from the death of his mother, on the 26th of *November* in the same year the dean and chapter, on the application of the pauper, and on payment by him of a fine of two guineas, granted a new lease of the premises in question at a new rent of one shilling, to hold to the pauper, his heirs and assigns for three new lives, which are still existing. The Sessions found that at this time all the lives in the first lease were extinct; *H. Barton*, the original lessee, and his son *Thomas*, having died in *Worcestershire* as above stated, and *Susanna*, the third life, having been absent from the country above 30 years, and not having been since heard of by her relations. The new lease was considered as an entire new demise and not a renewal of the old one, or in consideration of the surrender of it. Previous to the death of the pauper's father the pauper acquired a settlement in the parish of *Martley*; but from the time he became possessed of the premises to the present time the pauper has constantly resided upon them, and paid not only the yearly acknowledgment of 2*s*. 6*d*. to the dean and chapter of *Worcester* during the existence of the first lease, but also the yearly rent of 1*s*. reserved under the new lease thereof. From these premises in *Doddenham* the pauper and his family, having become chargeable to that parish, were removed to the parish of *Martley*; the new lease, of the 26th of *November* 1798, being still in force.

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Touchet and *Peake*, in support of the order of Sessions first observed that the old lease was at an end before the pauper's interest under the new lease commenced; for two of the lives were found to be extinct prior to 1796; and when the new lease was granted to the pauper in 1798 the third life under the old lease had not been heard of for 30 years, and consequently by reference to the statute 19 *Car.* 2. *c.* 6., must be presumed to have died after the expiration of the first seven years, no proof being made to the contrary. Then no settlement could be gained under the new lease, when the pauper lived on the estate in his own right; the purchase having been made by the pauper himself for a consideration under 30*l.* in value. And though it may be said that this was a voluntary grant of the dean and chapter, and not a purchase for a pecuniary consideration; yet, according to *Rex* v. *Warburton* (*a*), the consideration need not be in money paid at the time in order to bring the purchase within the stat. 9 *Geo.* 1. *c.* 7. *s.* 5.; for there a grant of a copyhold with 1*s.* fine, 1*s.* heriot, and 1*s.* rent, was holden to be a purchase within the statute, which could not confer a settlement. And here is a fine of two guineas, and a 1*s.* rent. [Lord *Ellenborough* C. J. There would be no difficulty in deciding that this was a purchase under 30*l.* within the statute. But admitting that; and presuming the third life under the first lease to be extinct; still, how can this order removing the pauper from *his own estate* be supported? This is an objection, distinct from the question of the settlement.] In answer they observed that this objection had not been made below. That here the pauper was actually charge-

(*a*) 1 *Term Rep.* 241.

able

ble before the order of removal, which differed it from the other cases. Where persons were heretofore removed as *likely to become chargeable*, there could be no presumption of consent on their part. But where a man applies to a parish for relief, as here, he must be taken to consent to all things necessary to afford him that relief in the due course of law, and consequently to consent to a removal under an order of justices to the place of his last legal settlement, where he is properly maintainable. Then if he consent, there is no disseisin of his freehold, which is the ground on which the illegality of a compulsive removal from a man's own estate is put by *Foster* J. in *Rex* v. *Aythrop Rooding* (a); which, however, was not a case of freehold, but of copyhold. But there the person removed was not chargeable: and though *Foster* J. thought that that would make no difference, yet Lord *Mansfield* and *Denison* J. seem to have been of a different opinion, particularly the former, who said that the wife could not be removed from her husband's property "upon being *only likely* to become chargeable." Then again in *Clypton* v. *Ravistock* (b), it was decided that magistrates could not make an order for the relief of a pauper on the parish to which he belonged unless he were within the parish at the time, and as one who is possessed of property within a parish where he resides is not entitled to relief there, as casual poor, but his property must first be applied to his support; it follows that unless he were liable to be removed, he might not be able to obtain present relief for want of a purchaser of such property.

Jervis and *Puller*, contrà, were stopped by the Court.

(a) *Burr.* S. C. 412. (b) *E.* 11 *Ann.* *Cas. of Set.* 49.

Lord

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Lord ELLENBOROUGH C. J. If the inference of consent to the removal, derived from the mere act of applying to the parish for relief, be pushed so far, it may as well be argued that the pauper consented also to a conveyance of his property, if that be a step towards entitling himself to relief. I cannot think that what fell from Mr. Justice *Foster* in the case of *Aythop Rooding*, when he said that the party's right to remain on his freehold was founded on Magna Charta, is to be treated lightly. He was speaking from analogy to the case of freehold; the premises there being copyhold. But he was not liable to draw comparisons rashly; and the reason of the thing applied equally to both. Here the party, whilst he resided on his own estate, was not liable to be removed.

GROSE J. was of the same opinion.

LAWRENCE J. The power of the justices to remove any person is founded on the stat. 13 & 14 *Car.* 2. *c.* 12. which extends to "any person who shall come to settle in any tenement under the yearly value of 10*l.*;" and these words having never been deemed to relate to persons living on their own estates, whether acquired by purchase or otherwise, or at whatever value; it followed that every person residing irremoveably for 40 days in the parish where his own property was gained a settlement: that encouraged persons to make small purchases for the purpose of settling themselves in particular parishes: and it was to remedy that inconvenience that the stat. of 9 *Geo.* 1. was passed, which provides that "no person "shall be deemed to acquire any *settlement* in any parish by "virtue of any purchase of any estate or interest in such "parish,

"parish, whereof the consideration, &c. doth not amount "to 30*l.* &c. *for any longer or further time than* such per- "son *shall inhabit in* (*a*) *such estate;* and shall *then* be liable "to be removed," &c.

LE BLANC J. The pauper was not precluded from obtaining relief, because having a settlement in another parish he might always obtain relief by going there.

Both Orders quashed.

(*a*) *Vide Dunchurch* v. *South Kilworth*, *Burr.* S. C. 553., and *Rex* v. *Houghton Le Spring*, 1 *East*, 247.

DEAN *against* PEEL.

Wednesday, April 25th.

An action on the case for debauching and getting with child the plaintiff's daughter and servant, per quod servitium amisit, is not maintained by evidence that the daughter, though under age, was living in another person's family in the capacity of a housekeeper, and had no intention at the time of the seduction to return to her father's house, though she afterwards did return there while within age in consequence of the seduction, and was maintained by her father.

THIS was an action on the case for debauching and getting with child the plaintiff's daughter. The declaration stated that the defendant, wrongfully intending to injure the plaintiff, debauched and carnally knew *E. D.*, *then being the daughter and servant of the plaintiff*, whereby she became pregnant, &c. and diseased, &c. by means whereof the said *E. D.* was rendered *unable to perform* the *necessary affairs and business* of her said father and *master*, during all which time *he was deprived of her service*, and was obliged to expend so much in nursing and taking care of her. The cause was tried before *Chambre* J. at the last assizes at *Lancaster*: when the facts appeared to be that the daughter, who was 19 years of age when she was seduced, was then living in the house of one *Taylor*, who had before married her sister, a few doors from her father's house in *Manchester*. *Taylor* kept a public-house; and his wife having then lately died, the plaintiff's daugh-

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ter acted as his housekeeper, and had the care of the bar: but no contract was made with her brother-in-law for wages, either by herself or the plaintiff her father, nor did she in fact receive any; and she might have left him when she pleased: but while her sister lay dead in the house *Taylor* told her that she might take what money she wanted. Finding herself with child she returned to her father's house, and afterwards lay in there at his expence: and after her removal thither she applied to *Taylor* for wages, who refused to pay any. The daughter, by whom the above facts were proved, added, upon her examination, that if this misfortune had not befallen her she had determined not to return to her father's house. On this evidence the learned Judge nonsuited the plaintiff, on the ground that there was no service proved to the father at the time of the seduction and getting with child: and that the daughter being under age at the time (which was pressed upon him as distinguishing this from former cases) made no difference, particularly as she had no animus revertendi to her father's family.

Topping now moved to set aside the nonsuit and for a new trial, on the distinction before taken. In *Postlethwaite* v *Parkes* (a), where the daughter was in another service, she was of full age at the time of the seduction; and this ground of objection to the action was insisted on as well as the foreign service; and the matter was compromised. It is true that in *Bennett* v. *Alcott* (b) *Buller* J. said that what influenced the opinion of the Court in the former case was that the daughter was in the service of another person; but the point has never been judicially decided against the father's right to maintain the action

(a) 3 *Burr.* 1878. (b) 2 *Term Rep.* 168.

where

where the daughter was under age at the time (*a*)." And he referred to the two following cases, where *Wilson* J. at nisi prius had given it as his opinion that if the daughter were *under age* the action was maintainable for her seduction, though she were not living with the father at the time. " *Booth* v. *Charlton*, at *Lancaster* in 1789, cor. *Wilson* J. This was an action by the father against the defendant for assaulting his daughter and debauching and getting her with child, per quod servitium amisit. On evidence it appeared that the daughter, on her first criminal connection with the defendant, was above 21 years of age, but she was living still with her father. The child was born two months after she attained 22. *Wilson* J. said that, according to his memory, the distinction in these cases was, that if the daughter were under the age of 21 the action was maintainable, though she should be upon a visit to or be living with another person her relation. But that if she were of age, the action was maintainable only in case of her living with her father. Verdict for the plaintiff for 15*l*." " *Johnson* v. *M'Adam*, before the same Judge, at the same assizes. This was a similar action to the foregoing. The daughter, from the time of her mother's death, about a year and a half before the seduction, lived with her father, and had the care and superintendance of his family: and while she was so living

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(*a*) In the case of *Saterthwaite* v. *Duerst*, *E.* 25 *Geo.* 3. *B. R.* upon a motion in arrest of judgment, where the Court held that an action on the case would not lie unless it were laid with a per quod servitium amisit, it was assumed that the daughter was of full age. And Lord *Mansfield* C. J. in delivering the opinion of the Court (after time taken to look into the cases) said that " it appears very extraordinary that any action should lie to a person on account of incontinence between two others, both of whom may be of full age: for it does not appear here that the daughter was not of age."

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with him she received an invitation from Mrs. *M'Adam*, the defendant's brother's wife, and in consequence went on a visit to her, to keep her company in the absence of her husband for three or four months, after which she returned to her father's. Her father was absent when she left home, and she went to Mrs. *M'Adam*'s without his knowledge or consent, but she had the consent of her aunt, who lived in the family, and took the superintendance of it in her absence. At the time of her leaving her father's, about the beginning of *July*, she was under 21, but attained that age the 2d of *September* following, and at the latter end of *September* was seduced by the defendant. Upon her return home she continued under her father's protection and maintenance, and was delivered at his house and at his expence, and the child was afterwards maintained by him. Inter alia, it was objected that the action was not maintainable, the daughter being of full age and sui juris when the seduction happened, and not resident with her father. But *Wilson* J. said that where the daughter was under age he believed the action was maintainable, though she were not part of his family when she was seduced. But where she was of age and no part of the father's family, he thought the action not maintainable. That in *Postlethwaite* v. *Parkes* the daughter was of age, and in the service of another family. That this was a middle case, and therefore he would reserve the point. Afterwards, in summing up the evidence to the jury, he told them that the consent of the father to the visit made by his daughter must be inferred from the circumstances; and that she might still be considered as part of his family. Verdict for 500*l.* And no new trial was moved for.

Lord

Lord ELLENBOROUGH C. J. In those cases the implied relationship of master and servant continued. But here there was no animus revertendi: the daughter declared on her examination that she had no intention of returning to her father's house before this misfortune; and she was actually in the service of another person. I think therefore that the opinion of the learned Judge who tried the cause was correct.

Per Curiam, Rule refused (*a*).

(*a*) Vide *Jones* v. *Brown, Peake's N. P. Cas* 233. and 1 *Esp. N. P Cas.* 217., where, in an action for an assault on the plaintiff's son and servant, a lad *under age* and *living with his father*, per quod servitium amisit, the plaintiff's counsel proceeding to prove that he was employed about his father's business, Lord *Kenyon* C. J. said that such evidence was unnecessary; if he lived in his father's family and under his protection, it was sufficient to maintain the action. *Vide* what was said by the same learned and noble Judge in *Fores* v. *Wilson, Peake's N. P. Cas.* 55., and vide *Barham* v. *Dennis, Cro. Eliz.* 770.

BELL *against* POTTS.

Thursday, April 26th

Where, in case, the plaintiff recovered a verdict at the trial and had judgment in *C. B.*, and upon a bill of exceptions returned into this court judgment was reversed, and the plaintiff took nothing by his writ, the defendant cannot have costs.

THIS was an action on a policy of insurance in the Court of Common Pleas, where there was a verdict for the plaintiff; and a bill of exceptions was tendered at the trial and allowed; upon which, the record being brought into this court, judgment was reversed. Whereupon the Master having taxed costs for the defendant, as if he had obtained a verdict originally, a motion was made for the Master to review his taxation, on the ground that the judgment not being for the defendant, but merely that the judgment for the plaintiff be reversed, and the plaintiff nil capiat per breve, no costs could be allowed to the defendant within any of the statutes granting costs. And

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Gibbs, who was to have ſhewn cauſe, admitted that he could not ſupport the defendant's right to coſts within any of the caſes putting a conſtruction on the ſeveral acts of parliament giving coſts to a defendant; although in the event it appeared that the defendant ought to have had a verdict at the trial, in which caſe he would have been entitled to his coſts, and the plaintiff would have had his coſts if he had ſucceeded.

Wigley in ſupport of this rule.

Per Curiam, Rule abſolute.

ROE, on the Demiſe of the Right Hon. THOMAS CONOLLY, *againſt* VERNON and VYSE.

Thurſday, April 26th.

Where there is a grant of a *particular* thing once ſufficiently aſcertained by ſome circumſtance belonging to it, the admiſſion of an allegation miſtaken or falſe reſpecting it will not fruſtrate the grant: but where a grant is in *general* terms, there the addition of a *particular* circumſtance will operate by way of reſtriction and modification of ſuch grant. Therefore where one having cuſtomary tenements, *compounded* and *uncompounded*, ſurrendered to the uſe of his will "*all* "*and ſingular the lands, tenements, &c. whatſoever in the manor, which he held of the lord by copy of* "*court-roll*, in whoſe tenure or occupation ſoever the ſame were, *being of the yearly rent to the* "*lord in the whole of* 4*l.* 10*s.* 8½*d. and compounded for*;" held that the words, "*and compounded* "*for*," reſtrained the operation of the ſurrender to that deſcription of copyholds then belonging to the ſurrenderor. And that the words "*being of the yearly rent, &c. of* 4*l.* 10*s.* 8½*d.*" which were not referable to any actual amount of the rents either compounded or uncompounded, though much nearer to the whole than to the *compounded* only, could not qualify or impugn that reſtriction. Where a teſtator had *freehold, cuſtomary*, and *copyhold* eſtates; and after introductory words, as to *all his worldly eſtate*, deviſed two rent-charges out of *all his real* eſtate, and alſo two *copyholds* in *Middleſex* for lives; and ſubject thereto deviſed "all his *freehold* manors, lands, &c. in *Yorkſhire* and other counties, and the reverſion of the two copyholds to his ſon for life, with ſucceſſive remainders in tail male to his firſt and other ſons, with like remainders to other branches in the male line: and in default of ſuch iſſue he deviſed all his "*ſaid* (freehold) manors, land," &c. to his eldeſt daughter in tail male in ſtrict ſettlement, with like remainders to his ſecond and third daughters: and by the reſiduary clauſe deviſed *all other* his manors, lands, &c. either *freehold or copyhold* (except thoſe in the counties of *York*, &c. which he had before diſpoſed of), ſubject to the ſaid *rent-charges, in failure of iſſue male of his ſon* and himſelf, to his three daughters, as tenants in common, in fee: held that certain *cuſtomary* eſtates, which the deviſor had, with freehold property in *Yorkſhire*, did not, on failure of the male line, paſs to the eldeſt daughter under the deſcription of all his *freehold* manors, lands, &c. in that and other counties. For, ſuppoſing that the *freehold* of ſuch *cuſtomary eſtates* be in the tenant, and not in the lord, they being holden not *at the will of the lord* as pure copyholds, but *according to the cuſtom of the manor*, and the tenants being entitled to the timber and mines, and the eſtates being demiſed and demiſeable in fee ſimple or otherwiſe; yet as they were holden by copy of court-roll, and paſſed by ſurrender and admittance, and were generally reputed and called *copyholds*, and the teſtator having diſtinguiſhed in other parts of his will between *copyhold* and *freehold*, he muſt be preſumed to have uſed the word *freehold* in its uſual and popular ſignification, as not including theſe *cuſtomary* eſtates conſidered by himſelf as *copyholds*; and therefore ſuch cuſtomary eſtates paſſed to the three daughters under the reſiduary clauſe. And it ſeems that as by ſuch reſiduary clauſe the daughters would not take till failure of iſſue male of the ſon and the deviſor; he, the ſon, the heir at law, took an eſtate-tail by implication in the cuſtomary eſtates not before deviſed.

THIS was an action of ejectment, on a demiſe laid the 1ſt of *Auguſt* 1802, for the recovery of certain cuſtomary tenements in the manor of *Wakefield*, in the county of *York*, which was tried before *Rooke* J. at the laſt *York* aſſizes; when a verdict was given for the plaintiff, ſubject to the opinion of the Court on the following caſe:

The cuſtomary tenements within the manor of *Wakefield* in the county of *York* are of two ſorts, *compounded*

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and *uncompounded*; the *compounded* are liable to *a fine certain* on alienation and defcent, by reafon of a compofition or agreement anciently made with the lord of the manor: the *uncompounded* are thofe for which no fuch agreement has been made, and are therefore liable to *a fine arbitrary*, that is, a fine not exceeding two years improved value of the premifes. *Thomas* Earl of *Strafford*, being feifed in tail male, viz. to him and the heirs male of the body of his father Sir *William Wentworth* deceafed, (which eftate is now extinct), with reverfion to himfelf in fee, as eldeft fon and heir of his father, of certain cuftomary tenements, with the appurtenances, in the manor of *Wakefield*, as well *compounded* as *uncompounded*, holden of the lord *by copy of court-roll*, by rents and fervices, according to the cuftom of the manor; and alfo feifed of a moiety of certain other cuftomary tenements in the manor, holden in like manner of the lord, viz. of certain cuftomary tenements *compounded*, *in fee*, and of certain cuftomary tenements *uncompounded*, in *tail general*, (which eftate tail is ftill fubfifting), with reverfion to himfelf in fee; and alfo feifed in fee of certain other *cuftomary tenements* which *he himfelf had lately purchafed*; on the 10th of *April* 1732, according to the cuftom of the manor, made the following *furrender* out of court of his cuftomary tenements, with the appurtenances, to the ufe of his will; "All and fingular the meffuages, "dwelling-houfes, cottages, clofes, lands, tenements, and "hereditaments whatfoever, with their and every of their "appurtenances, fituate, lying, and being in *Wakefield*, "*Stanley*, *Alverthorpe*, *Thornes*, and *Sandal Magna*, or elfe-"where within the faid manor of *Wakefield*, which he "the faid earl now holds of the lord of the faid manor of "*Wakefield* by copy of court-roll, in whofe tenures or oc-"cupations foever the fame now are or be, being of the

Surrender.

"yearly

" yearly rent to the lord in the whole of 4*l.* 10*s.* 8½*d.* 1804.
" *and compounded for.*" Which ſurrender was not brought into court till the year 1741, after the death of the ſaid earl, when the ſame was preſented according to the cuſtom of the manor. The ſaid rent of 4*l.* 10*s.* 8½*d.* *exceeded* the amount of the rents payable to the lord for the *compounded* cuſtomary tenements of the ſaid *Thomas* Earl of *Strafford*; Sir *William Wentworth*, the father of *Thomas* Earl of *S.* having, on his admiſſion in 1672 to the premiſes of which the earl was ſeiſed as aforeſaid, (except thoſe lately purchaſed by him,) paid a fine for his *compounded* cuſtomary tenements only of 3*l.* 15*s.*, being three times the amount of 1*l.* 5*s.*, the lord's rent for the ſame, and a fine of 80*l.* for his *uncompounded* lands. The whole of the rents paid to the lord by *William* Earl of *Strafford* hereinafter mentioned and his ſucceſſors for all the ſaid cuſtomary tenements, both compounded and uncompounded, amounted to 4*l.* 14*s.* 6*d.*, of which ſum 1*s.* 9*d.* was for the rents of the lands purchaſed by *Thomas* Earl of *Strafford*. *Thomas* Earl of *Strafford*, on the 22d of *June* 1732 by his will of that date, duly executed, &c. " As to the worldly eſtate with which it had pleaſed God to bleſs him," in the firſt place deviſed to his wife " out of all his real eſtate in the counties of *York*, *Nottingham*, and *Lincoln*, an annuity of 2000*l.* in lieu of her dower or thirds at common law, which ſhe might otherwiſe claim out of any part of his real eſtate, which he had been or ſhould or might be ſeiſed of at any time during their intermarriage." And after giving her for life all that his *copyhold* meſſuage and garden in *Twickenham* in the county of *Middleſex*, then in his own poſſeſſion, and which he had ſurrendered to the uſe of his will; and after deviſing out of all his real and perſonal eſtate whatſoever to his

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 mother

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mother an annuity of 200*l*. for her life, and the little houfe at *Twickenham* aforefaid in which fhe then lived, the fame being *copyhold*, and furrendered to the ufe of his will, in lieu of her jointure, dower, and thirds at common law, and all other demands out of the real and perfonal eftate of her late hufband his deceafed father, Sir *W. Wentworth;* the will proceeds thus: "And as to all "my *freehold* manors, meffuages, lands, tenements, and "hereditaments, in the counties of *York*, *Nottingham*, *Lin-* "*coln*, *Northampton*, *Suffolk*, *Kent*, *Surry*, and *Middlefex*, "or elfewhere in *Great Britain*, fubject as to the faid "premifes in the faid counties of *York*, *Nottingham*, and "*Lincoln*, to the faid two feveral rent-charges of 2000*l*. "per annum and 200*l*. per annum, fo hereby refpectively "devifed to my faid wife and mother as aforefaid, in "manner as before and after mentioned, and likewife "fubject to all legacies, &c., my perfonal eftate being "firft to be applied for that purpofe, I do give and devife "all my faid *freehold* premifes, from my deceafe, and alfo "I devife my two *copyhold* meffuages in *Twickenham* afore- "faid, from and after the refpective deceafes of my faid "mother and wife refpectively, unto my only fon *William* "Lord *Wentworth* for life, without impeachment of "wafte, as to fuch part of the premifes as are freehold, "other than voluntary wafte by pulling down *Wentworth* "*Caftle*," &c.: with fucceffive remainders in tail male to the firft and other fons of his faid fon *William* Lord *Wentworth*, and afterwards to the fecond and all other the fons of the teftator; and then as follows, "And in "default of fuch iffue male of my body, the faid two "feveral annuities of 2000*l*. per annum and 200*l*. per "annum, inftead of iffuing out of my faid manors and "lands in the faid counties of *York*, *Lincoln*, and *Notting-*

"*ham*,

" *ham*, ſhall, in caſe of my brother *Peter Wentworth* and " the heirs male of his body, be charged upon all the reſt " of my freehold manors, lands, and hereditaments whatſoever, and with the like powers of diſtreſs reſpectively " as aforeſaid, and alſo to be charged upon my intereſt in " the grant from the Crown of ſome of the poſt fines. " Provided that in caſe my ſaid other *freehold* premiſes " and poſt fines will not be of ſufficient yearly value to " anſwer the ſaid ſeveral annuities of 2000*l.* per annum " and 200*l.* per annum, that then ſuch deficiency ſhall " be made good out of my ſaid eſtate in the ſaid counties " of *York*, *Nottingham*, and *Lincoln*, ſo deviſed to my " brother. And in caſe of failure of iſſue male of me " and my ſaid ſon as aforeſaid, then I give and deviſe " all ſuch of my ſaid manors, lands, tenements, and hereditaments, ſituate in the ſeveral counties of *York*, *Lincoln*, and *Nottingham*, (being parcel of the premiſes ſo " deviſed to my ſaid ſon as aforeſaid) unto my brother *Peter Wentworth*, for life, without impeachment of waſte " other than voluntary," &c.; with remainder under the like reſtrictions to *William Wentworth*, eldeſt ſon of his ſaid brother *Peter Wentworth* for life; then ſucceſſively to the firſt and other ſons of his ſaid nephew *William* in tail male; then to his nephew *George Wentworth*, ſecond ſon of his ſaid brother *Peter Wentworth* for life; then ſucceſſively to the firſt and other ſons of his ſaid nephew *Geo. Wentworth* in tail male; then to the third and all other the ſons of his ſaid brother *Peter Wentworth* in tail male ſucceſſively. And then he deviſes as follows; " And *in default of ſuch iſſue* I give and bequeath all that " my capital ſeat called *Wentworth Caſtle*, and all *my ſaid* " *manors, meſſuages, lands, tenements, and hereditaments* in " the ſaid county of *York* unto my eldeſt daughter *Lucy*

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" *Ann Wentworth* for life, so as she and her husband (if " she take any) take upon themselves, within the time " after mentioned, the surname of *Wentworth*; with re" mainder to (trustees) to preserve contingent remainders; " and from and after the decease of the said Lady *Ann* " *Wentworth*, or upon her husband, if she take any, or " her failure of taking upon them the surname of *Went*" *worth*, I give and devise the said capital seat, manors, " lands, and hereditaments in the said county of *York* " unto the first and other sons of my said eldest daughter " Lady *Ann Wentworth* in tail male, successively, taking " upon them the surname of *Wentworth*;" with remainder under the like restrictions to his second daughter *Lady Lucy Wentworth* for her life, and to her first and other sons successively in tail male; with remainder under the like restrictions to his third and youngest daughter *Lady Harriott Wentworth*, and her first and other sons successively in tail male. And in default of such issue male of all his said three daughters, he devised the same premises in the said county of *York* to his own right heirs for ever. And the testator declared the said devises to his daughters and their issue male to be upon this express condition, that his daughters, their husbands, and issue male, should, within three months after coming into possession of the capital messuage, manors, lands, and premises in the county of *York*, take upon themselves the surname of *Wentworth*, and reside for three months in every year at *Wentworth Castle*, and keep the same in good repair; and in default thereof by any, the premises should go to the next in remainder on the like conditions. " And as to " all my said manors, lands, and hereditaments in the said " counties of *Lincoln* and *Nottingham*, from and after my " death without issue male, and the death of my said bro-

"ther *Peter Wentworth* without iſſue male I give and de- 1804.
"viſe the ſame premiſes unto my three daughters Lady
"*Ann*, Lady *Lucy*, and Lady *Harriott*, and their heirs, ROE d. CONOLLY *againſt* VERNON and VYSE.
"equally to be divided between them, ſhare and ſhare
"alike, as tenants in common and not as joint tenants.
"And as to all other my manors, meſſuages, lands, tene- *Reſiduary clauſe.*
"ments, and hereditaments whatſoever and whereſoever,
"either *freehold* or *copyhold*, (except thoſe in the ſaid
"counties of *York*, *Lincoln*, and *Nottingham*, which I
"have already ſo diſpoſed of by will), ſubject to the ſaid
"ſeveral rent-charges of 2000*l.* and 200*l.* per annum, and
"the legacies, &c. I give and bequeath the ſame, in fai-
"lure of iſſue male of the body of my ſaid ſon *William*
"Lord *Wentworth*, and of my own body, to my ſaid
"three daughters Lady *Ann*, Lady *Lucy*, and Lady *Har-*
"*riott*, and their heirs, equally to be divided betwixt them
"as tenants in common, and not as joint tenants." The will alſo contained powers to the teſtator's ſon *William* Lord *Wentworth*, and to the teſtator's brother *Peter Wentworth* and his ſons, when in poſſeſſion, reſpectively to leaſe for 21 years, and to jointure a wife out of the premiſes deviſed to him, except *Wentworth Caſtle*; and for his brother *Peter W.*, when in poſſeſſion, to charge 4000*l.* on the premiſes deviſed to him for his daughter *Ann*. The teſtator, *Thomas* Earl of *Strafford*, died in *November* 1739, leaving his ſon *William* Earl of *Strafford*, and his ſaid three daughters, and alſo his nephews *William* and *George*, the only iſſue of his brother *Peter Wentworth*, then deceaſed, of whom *George* is ſince dead without iſſue. *William* Earl of *Strafford* entered upon the ſaid cuſtomary premiſes, and died without iſſue in *March* 1791. Lady *Ann*, the eldeſt daughter of *Thomas* Earl of *Strafford*, married the Right Hon. *Wm. Conolly*. She ſur-

vived

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vived her husband and died in *February* 1794, leaving the lessor of the plaintiff, her only son. The defendant *R. W. H. Vyse* is the grandson of Lady *Lucy*, the second daughter, also deceased, by her daughter *Anne*, who married General *Vyse*, and is since deceased; and the defendant *Henry Vernon* is the son of Lady *Harriott*, the third daughter of *Thomas* Earl of *Strafford*, also deceased. *Frederick Thomas*, the son of the said *William Wentworth*, in *March* 1791, upon the decease of *William* Earl of *Strafford*, became Earl of *Strafford*, and entered upon the said customary premises, and died without issue in *August* 1799, leaving *Augusta Ann Kaye*, his sister and heir at law, but never was admitted tenant to the said premises, or any of them. He also, in 1791, suffered a recovery of *Wentworth Castle* and the other premises of *freehold* tenure in the county of *York*, devised to him by *Thomas* Earl of *Strafford*. On the 11th of *February* 1802 the lessor of the plaintiff was admitted at the court baron tenant to the said customary premises under a writ of mandamus; the copy of the admittance stating that he as heir male of the body of Lady *Anne* prayed to be admitted tenant, under the said will, to all the *copyhold* messuages, lands, &c. within the manor, of which *Thomas* Earl of *Strafford* died seised; stating also some of them to be of the nature of copyhold *uncompounded for*, and the residue to be of the nature of copyhold *compounded for*, and that the same were granted by the lord of the said manor to the said *Thomas Conolly*, to hold to him and the heirs male of his body, according to the limitations of the said will, to be holden of the lord of the said manor by the rents, fines, suits, and services, *according to the custom thereof*. On the 20th of *February* 1802 the lessor of the plaintiff, according to the custom of the said manor, suffered a recovery of the *compounded*

pounded part of the ſaid cuſtomary premiſes to which he had been ſo admitted. *Wentworth Caſtle*, of which *Thomas* Earl of *Strafford* was ſeiſed in fee at the making of his will and at his death, is of *freehold* tenure, and is ſituate near ten miles from ſome part of the manor of *Wakefield*, and from that to 14 miles from other parts. There is alſo an old manſion-houſe at *Wakefield* of *freehold* tenure, belonging to the *Strafford* family, and alſo a cloſe of land adjoining thereto of three acres, alſo of *freehold* tenure, of which *Thomas* Earl of *Strafford* was ſo ſeiſed. The land adjoining to the manſion-houſe is claimed by the Duke of *Leeds*, as *uncompounded*. The manor of *Wakefield* was of ancient demeſne of the Crown of *England*, and the ſaid cuſtomary premiſes, as well as the other cuſtomary tenements within the manor, from time immemorial have been and are *demiſed and demiſeable* by *copy of court-roll*, by the lord or his ſteward, to any perſon willing to take the ſame in fee ſimple or otherwiſe, according to the cuſtom of the manor; being always *called and reputed to be copyhold;* but none of the grants or admittances ſtate that the tenant is to hold *at the will of the lord*. In the reign of *James* I., about the year 1607, an information was exhibited by the Attorney-General of the duchy of *Lancaſter* on behalf of his Majeſty againſt a great many of the tenants of his Majeſty's manor of *Wakefield*, (982 in all,) whereby they were mentioned to be *copyholders* of the ſaid manor; and that the greateſt part of the lands within the ſaid manor were *copyhold* lands, parcel of the ſaid manor, *demiſed and demiſeable by copy of court-roll* to any perſon or perſons willing to take the ſame in fee ſimple or fee tail, or for term of life or lives, *at the will of the lord*, according to the cuſtom of the manor, at and for fines uncertain at the will of the lord or his ſteward, to

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to be paid to the lord upon every grant or admittance thereof: but ſtating that the tenants pretended that by the cuſtom the fines were not arbitrary, but certain, viz. "For every admittance by ſurrender or deſcent to any "eſtate of inheritance in poſſeſſion, according to the cuſ- "tom of the ſaid manor, one year's rent and an half, ac- "cording to the rent paid to his Majeſty, &c.; and half "as much for every admittance to any eſtate for life, "lives, or years in poſſeſſion or reverſion, or to any "eſtate of inheritance in reverſion, depending upon "ſome particular eſtates;" which the Attorney-General denied; and ſhewed further, that there were parcels of the waſtes of the manor, not demiſed or demiſe- able by copy of court roll until of late, ſome part of which had been ſo demiſed, into which the defendants had unlawfully intruded, and had procured grants thereof by copy of court roll without right or title; and made like pretence and claim for the certainty of the fines for grants and admittances of the ſaid waſte as for the afore- ſaid ancient *copyhold* tenements; wherein the Attorney-General prayed the advice of the Court, &c. To which information the tenants anſwered; confeſſing that a great part of the lands within the manor were *copyhold* parcel of the manor *demiſed and demiſeable by copy of court roll* of the ſaid manor, *according to the cuſtom of the ſaid manor*, in fee ſimple, fee tail, or otherwiſe. And alleged that ſome of them held in fee ſimple, and others in fee tail, with re- mainders over, by copy of court roll, according to the cuſtom of the ſaid manor; and inſiſted that the admit- tance fines for the ſaid copyhold lands were not arbitrary but certain, and had been uſually aſſeſſed as the informa- tion charged that they had pretended them to be. And after admitting that divers parcels of the waſte had been granted

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granted by copy of court roll, and that divers of the defendants held parcels thereof, so improved and granted by copy as aforesaid, &c. they prayed that the said parcels of waste might by the Court be declared to be and thereafter to continue lawfully demised and demiseable by copy of court roll, according to the custom of the said manor, upon such rents, &c. as theretofore were, or for such other reasonable fines as should be thought meet to the Court: and they prayed the Court to decree the fines of the *ancient copyholds* to be certain, according to their petition to his Majesty as well for the confirmation of the certainty of their fines as of the said grants of the waste. Whereupon after petition to and composition made with his Majesty for the sum of £.   paid by the said copyholders, it was by the duchy court on the 27th *November*, 7 *Jac.* 1. decreed, that all the tenements, whether theretofore parcel of the said waste or no, which were then held and compounded for by the defendants, should for ever thereafter remain good and perfect *copyhold* tenements, demised and demiseable in fee simple, fee tail, for life, lives, years, or otherwise, *by copy of court roll, according to the custom of the said manor*, any defect, &c. to the contrary notwithstanding. And that all and singular the said tenements, and every part thereof, should be demised and demiseable, and should be esteemed, taken, and adjudged to have been, and for ever thereafter to be demised and demiseable by *copy of court roll, according to the custom of the said manor of* Wakefield, at and for such customs and services as theretofore, and at such rents as were then paid as well for the parcels of waste as for other the *copyhold* tenements of the manor holden by the defendants. And further that, in future, fines certain and therein specified should be paid on admittances of every

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every *copyholder* to eſtates of inheritance in the ſaid *copyhold tenements*. Which decree was afterwards confirmed, and the tenements therein mentioned were enacted to be good and perfect *copyhold* lands and tenements, according to the true intent and meaning of the ſaid decree, by an

Stat. 7 *Jac.* 1.

act of parliament paſſed in the 7th *Jac.* 1.; and whereby it is alſo enacted that all perſons ſhould hold the ſame to them, their heirs and aſſigns for ever, *by copy of court roll or otherwiſe, according to the cuſtom of the ſaid manor, according to the purport and effect of the ſaid decree*, for ſuch fines, rents, &c., and with ſuch privileges, &c. as in the ſaid decree limited and appointed; ſaving to all perſons (other than the King and his ſucceſſors) all ſuch eſtates, rights and titles as they had in the premiſes, as if that act had not been made. This decree was recorded on the court rolls of the manor of *Wakefield* on the 29th of *July*, 9th *Jac.* 1. The *coal mines* and the *minerals* under the cuſtomary tenements of the ſaid manor, and the *timber* growing thereon, do not belong to the lord but to the cuſtomary tenants of the cuſtomary tenements for the time being; who when ſeiſed of their cuſtomary tenements for any eſtate of inheritance are entitled to get the coals and minerals under the ſame, and the timber thereon. The leſſor of the plaintiff has received one-third of the rents and profits of the cuſtomary premiſes in diſpute for one year ſince *November* 1801, and never took the name of *Wentworth*; and the defendants are in poſſeſſion of the two other third parts of the ſame premiſes. It was agreed, that this caſe ſhould be turned into a ſpecial verdict at the requeſt of either party or of the court. The queſtions for the opinion of the Court were, Whether the leſſor of the plaintiff were entitled to the whole of the ſaid cuſtomary tenements, with the appurtenances

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first abovementioned *compounded* and *uncompounded*, or to the *compounded only*, and to all of the said moiety of such of the customary tenements secondly above mentioned as were *compounded*, and to the whole of the said customary tenements, with the appurtenances, which the said *Thomas* Earl of *Strafford* purchased as aforesaid *compounded* and *uncompounded*, or to the *compounded only*, or any and which of them? If the lessor of the plaintiff were entitled, then the verdict was to stand: if he were not, then the verdict was to be entered for the defendant.

Holroyd, for the lessor of the plaintiff, made two questions; 1st, as to the effect of the *surrender* of *Thomas* Earl of *Strafford*, of the 10th of *April* 1732, to the use of his will, whether it extended to surrender his *uncompounded*, as well as his *compounded* customary tenements? 2d, As to the effect of his *will*, whether the customary tenements included in the surrender passed by his will to his eldest daughter Lady *Anne* and her first and other sons in tail (under which description the lessor of the plaintiff claims) under the devise of all his *freehold* manors, &c. considering such customary tenements as *customary freeholds*; or if not under that description, whether they did not pass to her and her first and other sons *by implication* from the whole will taken together? or whether such customary tenements, being *copyhold*, passed by the residuary devise to the testator's three daughters, the Ladies *Anne*, *Lucy*, and *Harriott*, (under the two last of whom the defendants claim)? 1st, The surrender to the use of the will of *Thomas* Earl of *Strafford* is of *all the tenements*, &c. holden of the lord of the manor of *Wakefield* by copy of court roll, "being of the *yearly rent* to the lord *in the* "*whole of* 4l. 10s. 8½d. *and compounded for*," which latter is

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is a falſe allegation; for the rent of the old *compounded* tenements, which were holden by his father, amounted only to 1*l.* 5*s.*; and the rent of the whole, *compounded* and *uncompounded* together, amounted but to 4*l.* 14*s.* 6*d.*; of which 1*s.* 9*d.* was for the rents of the lands purchaſed by the ſurrenderor himſelf, which were *compounded.* The amount therefore of the rents mentioned in the ſurrender does not agree with any deſcription of property of this kind which he poſſeſſed, but it comes much nearer to the amount of *the whole* of the rents *both compounded and uncompounded* than to the *compounded alone*; and therefore the latter words "*and compounded for*" are clearly inſerted by miſtake: it is a falſe allegation, inapplicable to the ſtate of the ſurrenderor's property, and not intended as a deſcription of the kind of property meant to be ſurrendered. Then the prior deſcription of the tenements meant to be *ſurrendered*, viz. "all and ſingular the meſſuages, &c. which the ſaid earl now holds of the lord of the ſaid manor of *Wakefield* by copy of court-roll, in whoſe tenures or occupations ſoever the ſame now are," is plain and ample enough to include the *uncompounded* as well as the *compounded* tenements: and as the amount of the rents mentioned agrees very nearly with the *whole* as deſcribed in the ſurrender, and the trifling miſtake in the computation would not of itſelf vitiate or narrow the ſurrender as for the whole, ſuppoſing the words "*and compounded for*" were not added; theſe words may be rejected as a falſe allegation concerning that which was before deſcribed generally with ſufficient certainty; and then the ſurrender will include the *uncompounded* as well as *compounded* lands. In *Blague* v. *Gold* (*a*) a deviſe of a houſe called "the Corner Houſe" was holden a ſufficient

(*a*) *Cro. Car.* 447 and 473.

ficient description to pass the house so named, though it was further stated to be in the tenure of *A.* and *B.*, when in fact it was in the tenure of *A.* only; the adjoining house being in the tenure of *B.* So a feoffment *by deed* of a man's messuage *late of R. C.* in *D.* will operate, though he had in fact lately purchased it of *T. C.* *Windham* v. *Windham* (*a*). And again, in the case of *The Vicars Choral of Litchfield* v. *Ayres* (*b*), a grant of certain tithes, &c. and all other tithes appertaining to a certain rectory was holden not to be vitiated by a false allegation that they were *all lately in the tenure of* M. P., when only part of them were. Secondly, the customary tenements included in the surrender passed to Lady *Anne* under the description of all the testator's "*said* manors, messuages, "lands, &c. in the county of *York*," &c. Supposing the word *said* to refer to the description before used of "all "his *freehold* manors," &c. That will depend on the nature of these customary estates, which were ancient demesne, and most usually *customary freeholds*. The mines and timber belong to the tenants and not to the lord; which shews that in the earliest times they were estates of inheritance, and not merely estates of a freehold nature only. The holdings are not *at the will of the Lord*, which is the distinctive mark of copyhold or base tenure, but *according to the custom of the manor*. The language then of the lord or his steward calling them *copyholds* cannot make them so. Lord *Coke*, (*Copyh. s.* 32.) speaking of common copyholders, says, "Neither was their estate hereditary in the beginning, as appeareth by *Britton*; for if they died, their estate was presently determined, as in case of a tenant at will at common law. And in some points to this present hour, the law regardeth them no more than a mere tenant at will; for the

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Construction of the will.

(*a*) *Dy* 376. *b.* (*b*) *W. Jones*, 435.

freehold

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freehold at the common law *resteth not in them*, but in their *lords, unless it be in copyholds of frank-tenure, which are most usual in ancient demesne* (a)," &c. "These kinds of copyholders have the *frank-tenure in them*, and it is not in their lords, as in case of copyholders in base tenure." So in *Co. Lit.* 49. *a.* and 59. *b.* it is said that *by custom* a freehold and inheritance may pass by *surrender*, without livery: and *note* 6. to the former passage in Mr. *Hargreave*'s edition gives some instances, as that of *Lydford Castle* in *Devon* (b); and adds, that in consequence of this kind of custom the estates subject to it have been called *customary freeholds*. And where an estate is granted by copy to hold according to the custom of the manor, omitting the words *ad voluntatem domini*, it shall be intended to be a *freehold*. *Hughs* v. *Harrys* (c): and those words are the distinguishing mark of copyhold: *Hill* v. *Bolton* (d). And if they are omitted, the land must be taken to be *freehold*. *Rogers* v. *Bradley* (e). So by *Holt* C. J. (f), "Where a custom is that all lands holden of that manor shall pass by surrender and admittance, yet the lands may be *freehold*," &c. And in *Gale* v. *Noble* (g), it was directly adjudged that these customary estates holden *according to the custom of the manor, and not at the will of the lord*, were *not copyholds*, but *customary freeholds*; though it appeared there that the tenants had constantly taken their estates to be copyhold. The same distinction is taken in *Hussey* v. *Grills* (h), and *Crowther* v. *Oldfield* (i); which last it appears from the report in *Lutwiche* was a case arising out of this very manor of *Wakefield*; but there the estate

(a) This passage is quoted by the Court in giving judgment in *Burrell* v. *Dodd*, 3 *Bos. & Pull.* 382.

(b) 5 *Co.* 84. *b.* (c) *Cro. Car.* 229. (d) 2 *Lutw.* 1271.

(e) 2 *Ventr.* 143. (f) *Anonym.* 11 *Mod.* 53. (g) *Carth.* 32.

(h) *Ambl.* 301. (i) *Salk.* 364. 2 *Ld. Ray.* 1225. and 1 *Lutw.* 125.

which

which was declared to be holden by copy of court roll, according to the cuſtom of the manor, was intended after verdict to be alſo holden *at the will of the lord* to entitle the party to his common claimed by the cuſtomary tenants within the manor. Then there is nothing inconſiſtent with theſe being cuſtomary freeholds in the information and decree in the time of *James* 1ſt, or the ſtatute founded thereon. The objects of the information were two; 1ſt, to get rid of the certainty of the fines; 2d, to ſet aſide certain intruſions on the waſte. The information alleges that the tenements were copyholds *at the will of the lord*, according to the cuſtom of the manor. But though the anſwer by the tenants confeſſes the lands to be *copyhold*, "*according to the cuſtom of the manor*," yet from what is ſtated it appears that they were *cuſtomary freehold*; and the prayer of the defendants is, that the lands might be declared to be "demiſed and demiſeable by copy of court roll, according to the cuſtom of the manor, upon ſuch rents and for ſuch fines, &c. [illegible] mentioned to be paid, &c.;" and the decree, which confirms them to be *copyholds*, declares them at the ſame time to remain "demiſed and demiſeable *in fee ſimple*, &c. or "otherwiſe by copy of court roll, *according to the cuſtom* "*of the manor*, at the old rents;" omitting "*at the will of the lord*:" which ſhews that they were not copyholds in the legal ſenſe, but cuſtomary freeholds. The decree then did not alter the old tenure, but left it as it was before. The object of the ſtatute was merely to carry the decree into effect: and it contains, beſides, a ſaving of the rights of all perſons, other than the King and his ſucceſſors. The terms of admittance ſtating the lands to *be holden of the lord by copy of court roll*, generally, cannot vary the nature of the eſtate; for thoſe are merely the words of the

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lord and his steward; nor can the reputation of their being *copyholds*, and being so called, alter the legal tenure. The question then is, whether, if the tenements be customary freeholds, they passed to Lady *Anne* and her descendants under the words of the will. A devise or lease of all a person's *lands* will pass *customary* copyhold as well as freehold lands; as in *Acherley* v. *Vernon* (a). But in *Haslewood* v. *Pope* (b), where there was a devise of all a man's lands in trust to pay debts, &c. and the devisor had freehold and copyhold; held the former only would pass, unless he had surrendered his *copyhold* to the use of his will, which shewed an intention to pass both. And *Tendril* v. *Smith* (c) is also express to that purpose. In the same manner where there is a general devise of *freehold* lands, all *freeholds* will pass, whether *customary* or at *common* law. Besides which, in this case the introductory words shew that the devisor meant to pass the whole of his property; for he says, "as to the worldly estate," &c.; which Lord *Kenyon*, in *Doe* v. *Buckner* (d), said was sufficient to shew an intent to dispose of all the devisor's property, if there were subsequent words in the will to carry that intent into execution; as in *Ibbetson* v. *Beckwith* (e): and the word *estate* is of itself sufficient to pass an estate of inheritance, without words of limitation (f): and such introductory words were also relied on in *Smith* v. *Coffin* (g), and *Gulliver* v. *Poyntz* (h). The words, "*all my freehold manors*, "*messuages, lands*," &c. are not to be narrowed, but to have their full effect from the introductory words. Here

(a) 9 *Mod.* 68. 10 *Mod.* 518. 529. and *Comyn. Rep.* 381.
(b) 3 *P. Wms.* 322.
(c) 2 *Atk.* 85. Vide also *Goodwyn* v. *Goodwyn*, 1 *Vef.* 226.
(d) 6 *Term Rep.* 612.
(e) *Caf. temp. Talb.* 157.
(f) *Doe* v. *Allen*, 8 *Term Rep.* 502.
(g) 2 *H. Blac.* 444.
(h) 3 *Wilf.* 143.

too

too the will was made within two or three months after the date of the ſurrender; which alſo affords a preſumption that the deviſor contemplated to paſs by his will the lands included in the ſurrender. Further, the deviſor firſt deviſes the annuity to his wife and mother "*out of all his real "eſtate whatſoever*:" and then he deviſes "all his *freehold* "manors, &c. in the counties of *York*, *Nottingham*, &c. "*ſubject as to the ſaid premiſes* (which muſt mean *all the "lands* cuſtomary or otherwiſe) in the ſaid counties of "*York*," &c. *to the annuities* before deviſed to his wife and mother, to his ſon, &c. Then in caſe of failure of iſſue male of his ſon, he deviſes "all his ſaid manors, lands, "&c. in the counties of *York*," &c. to his brother, &c. Then in default of the male line, in the clauſe in queſtion he deviſes *Wentworth* caſtle, and *all his ſaid manors, meſſuages, lands, tenements, &c. in the ſaid county of* York unto his daughter Lady *Anne*, &c. This ſhews that he meant to paſs *all his eſtate* that he had before ſubjected to the rent-charges to his wife and mother. And again, in caſe the deviſor's other freehold premiſes and poſt fines were not ſufficient to pay the annuities while his brother *Peter* and his heirs male were in poſſeſſion of the eſtates in *Yorkſhire*, the deficiency is to be made good out of his *ſaid eſtates* in the counties of *York*, &c. before deviſed to his brother: which ſhews that he conſidered he had before deviſed the whole of his eſtate in *Yorkſhire* to his brother by the ſame deſcription as he afterwards deviſed it to Lady *Anne*. Then nothing can be argued againſt the general intention to paſs the *cuſtomary* eſtates under the general term of *freehold* lands, &c. from the particular mention of *copyholds* in parts of the will; for as he had before deviſed the copyholds in *Twickenham* to his wife and mother reſpectively, he neceſſarily mentions thoſe copyholds

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by name in the leading limitation to his son (which precedes the devise in question); because his son and the subsequent devisees in remainder would only take the *reversionary interest* in them after the life estates of the wife and mother were spent: and that accounts for the devise of "all his said *freehold* premises, and also his *two copyhold* messuages in *Twickenham after the respective deceases of his mother and wife* to his son, &c. It appears therefore that he used the term *freehold* ("all his *freehold* manors, lands," &c.) in its most general sense, as including *customary* as well as *common law freeholds*; which customary freeholds were distinguished in *Crowther* v. *Oldfield* (*a*) from *copyholds* properly so called. And in *Greenhill* v. *Greenhill* (*b*), where one had articled for the purchase of lands, *part* of which were *customary* lands, which were paid for, and the conveyances were to be executed at *Michaelmas*, and in *June* preceding he devised the residue of his personal estate to be laid out in land, and the land so to be purchased, together with his *freehold* estate, to be settled on the plaintiff, &c.: held that the land thus contracted for, including the *customary* lands, passed by the will. It was said indeed there that *freehold* was only named in contradistinction to *personal* estate. But here it is not mentioned in contradistinction to *customary* lands, though it may to *copyhold* holden *at the will of the lord*, of which the devisor was also possessed. [*Lawrence* J. He had no copyhold of that description in the counties of *York*, *Nottingham*, or *Lincoln*; and therefore he could not have mentioned *freehold* in that part of his will in contradistinction to copyhold holden at the will of the lord.] Then as to the residuary clause, if these customary lands are not before devised, they cannot pass but by implication, until

(*a*) *Salk.* 364. (*b*) 2 *Vern.* 679.

failure

failure of issue male of himself and his son: but it is a settled rule that if there be words in a will sufficient to pass an estate, it shall not be left to pass by implication. As to the powers of leasing and jointuring, they are as necessary in the case of customary as of common law freeholds.

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Walton, contrà, (after premising that in consequence of Mr. *Conolly*'s death recently, he should wave the question as to the forfeiture by his not having taken the name of *Wentworth*,) made two questions; 1st, on the effect of the surrender, Whether it comprized the *uncompounded* lands? 2dly, on the general construction of the will, in respect of the devise of all the devisor's *freehold* manors, &c. and on the residuary devise to the three daughters. 1st, At the time of the surrender Lord *Strafford* was seised of three descriptions of copyholds; 1. copyholds *compounded* and *uncompounded* (in other words, with fines certain and fines arbitrary), of which he was seised in tail male as heir of his father; 2. of moiety copyholds *compounded* and *uncompounded*; over the compounded he had a disposing power; of the uncompounded there was a general entail still subsisting, of these, therefore, he was seised in tail general; 3. of copyholds, some *compounded*, some *uncompounded*, which had been purchased by himself; of which the lord's rent was not above 1*s*. 8½*d*. He had, therefore, very little disposing power over the copyholds, without incurring the expence (two years' value) of barring the entail, and that too by means of making a lease for six years (*a*), which creates a forfeiture. The

Construction of the surrender.

(*a*) Where there is no particular custom within a manor for barring an entail, it is said that the surrender itself to the use of the will may bar it, *White* v. *Thornburgh*, 2 *Vern*. 705, and *Moore* v. *Moore*, *Ambl*. 279.

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uncompounded lands constituted much the greater part, of which he had not the immediate disposing power, but only a distant reversion: there is therefore nothing improbable in supposing that he meant to pass by the surrender those only which it expresses, namely, the *compounded* lands. Surrenders are to be construed as strictly as deeds, and that is a bad construction which leaves out an integral part of a sentence, the plain and obvious sense of which is to control the former words of it. It is a general rule in constructing any deed or instrument that where there is sufficient certainty before by way of description of the thing granted, as by giving to a close a particular name, &c.; there a subsequent mistake, as in the tenant's name, the number of acres, or the rent, shall not hurt the grant. But where the premises are first described *generally*, and afterwards a *particular* description is added, that shall restrain the general words. *Bro. Abr. Grants*, *pl.* 92. *Fitzh. Abr. Release*, *pl.* 11. In *Doddington's* case (*a*) it is said where one grants omnia *illa* messuagia in tenura *J. B.*, scituat. in *W.*, &c., and in truth the lands lie in *D.*, the grantee shall not have any lands out of the town to which the generality of the grant doth refer: "for *illa* makes such a necessary reference, as well to the town as to the tenure of *J. B.*, that if one or the other fail the general grant is void: for *illa* is not satisfied till the sentence be ended, and it governs all the sentence till the full stop." So where one devised to his son *H.* all his lands, &c. freehold and *copyhold* in *C.* or elsewhere in the county of *M.* ("which copy lands I have surrendered to the use of my will) to him and his heirs;" Lord Chancellor held that the words in a parenthesis could not be rejected as superfluous; that they were to be taken as restrictive of

(*a*) 2 *Rep.* 33.

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the former words; and therefore that a part of the copyhold house in *C.* which he had purchased after the surrender to the use of his will did not pass. And this ruled a similar case of *Wilson* v. *Mount* (*a*), where the Master of the Rolls states the result of the cases referred to to be, that if a *viz.* be repugnant to what has gone before, it shall be rejected; but *if it can be reconciled and made restrictive, it shall be so.* As to the principal case cited contrà of *Swift* v. *Eyres*, it is also reported in *Cro. Car.* 548., and there the reason assigned why the last clause was not restrictive is, because what went before was not in one entire sentence, but distinct and disjoined from the other: and then the word *all* ("all which were," &c.) so disjoined could not be a restriction but an explanation. 1804.

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Next, As to the construction of the will; it is contended that the customary estates surrendered are *customary freehold*, and that they passed under the devise of "all "his *freehold* manors, lands," &c. For all his *said* manors, &c. in the devise to Lady *Anne* must have reference to the manors, &c. before described, which are designated as *freehold manors*, &c. But it is clear that they are in general considered not as *freeholds*, but as *copyholds*. They are a species of villenage tenure, holden by *copy of court roll*; the name of *copyhold* being comparatively modern (*b*); transmissable by surrender and admittance; forfeitable if leased for above a year, or in default of suit and service. All these circumstances shew them to be of base tenure, or at best no more than a superior kind of copyholds. The tenants were more privileged when holding of the king in ancient demesne, than when holding of inferior barons. 2 *Blac. Com.* 99, 100. gives shortly the result of the treatise on copyholds, and shews what the learned au-

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(*a*) 3 *Ves. jun.* 191. (*b*) Vide *Fitz. Na. Brev. Writ de Recto Claus.* 25.

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thor considered these customary tenants to be, namely, only highly privileged villeins, whose *tenure* was absolutely *copyhold*, though they had an *interest* equivalent to a *freehold*. But if the tenants were freeholders they must have a right to vote for knights of the shire: but in the election of 1755 for the county of *Oxford*, where a customary tenant in ancient demesne had voted for Lord *Wenman*, the House of Commons set aside his vote. In the year following a bill was brought into the House to settle the question, which did not pass. In 1758 *Blackstone's* tract, intitled "Considerations on Copyholders," was first published, and soon after the statute 31 *Geo.* 2. *c.* 14. was passed, which is tantamount to a declaratory law, reprobating the pretended right of such customary tenants to vote as freeholders, and denying the exercise of it in future under a penalty. If this were a freehold tenure it must have been abolished and reduced to free and common socage by the stat. 12 *Car.* 2. *c.* 24. not being within either of the excepted cases. Land claimed as ancient demesne is always pleaded to be *parcel of the manor*; and so it was pleaded to be in *Crowther* v. *Oldfield* (*a*) in this very manor: and there the judgment having been arrested in *C. B.* for want of laying the copyhold in respect of which the common was claimed to be holden *ad voluntatem domini*, that judgment was reversed in *B. R.*; the defect being cured by verdict; for, as was said, freehold could not be *parcel of the manor*, as this was laid to be, though it migh be holden *of the manor*: and that was relied on in *Burrel* v. *Dodd* (*b*). Some Judges indeed, in the cases referred to, have considered these customary estates as *freeholds*, generally: but that is a mistake. Tenants in ancient demesne are of three sorts; 1. *Charter tenants*,

(*a*) 1 *Lutw.* 125. *Salk.* 364. 2 *Ld. Ray.* 1225.
(*b*) 3 *Bos.* & *Pul.* 381.

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who are seised as of freehold: 2. *Tenants by copy* of court-roll, or *customary tenants*: 3. *Bond tenants*. To the former description only can the term *freehold* be in any sense applied. *Fitz. Na. Br. Writ de Recto Clauso*, 23. and the notes. And in *Doe* d. *Reay* v. *Huntington* (*a*) these customary tenants were lately considered as a class of copyholders. [Lord *Ellenborough* C. J. Some of those tenants, though obliged to perform military service in attending on the border of *Scotland* for an uncertain time, and therefore so far favouring of military tenure by escuage uncertain, were yet, upon a question referred to the Judges, and amongst others to *Hutton* J. in the time of *James* I., considered to be copyholders.] Besides, these estates are found to have been always called and reputed *copyholds* by the tenants: and, as such, it is reasonable to presume that the testator considered them in common with the other tenants; and that he used the word *freehold* in its common and popular acceptation. And they are named copyhold in the admittance of the lessor of the plaintiff himself, and in the mandamus which he sued to admit him. They are also so called in the proceedings in the time of *James* I. And the tenants there admit that they are *copyhold*, though not that they are holden *at the will of the lord*, as suggested in the information filed by the Attorney-General: and such they are stated to be by the decree, confirmed by the act of parliament; the *saving* in which relates only to strangers to the decree, and not to those who were privies to it, as the tenants were, and therefore bound by it. And the decree includes all the tenements and not merely those taken out of the waste. Then as to the general construction of the will, introductory words can only serve to explain the *intention* to pass *all* the

(*a*) 4 *East*, 128.

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the devisor's property, where there are subsequent words large enough to carry the whole property: but here the words of devise limit the description to *freehold* property. No intention can be gathered from thence to pass the *customary* estates, which are of the nature of *copyhold*. If he had meant to pass them he would have probably said so in terms, especially as he mentioned certain *copyholds* at *Twickenham* by name; or at least he would not have excluded such an intention by the addition of the term *freehold* to the other general terms of description. But further, the old customary estates would have descended to Lady *Anne* as tenant in tail under the old entail, and therefore it was nugatory to give her an estate for life. Again, the *leasing* power is inapplicable to *customary* estates, which could not be leased for above a year without creating a forfeiture; and there would be great difficulty in applying to them the charging and jointuring power: it could only be done by surrendering them to trustees. Then the residuary clause is comprehensive enough to convey all the property not before disposed of. He thereby gives to his three daughters, in default of issue male of himself and his son, "all other his manors, messuages, lands, &c. whatsoever and wheresoever, either freehold or *copyhold*, (except those in the said counties of *York*, *Lincoln, and Nottingham, which I have already so disposed of*," &c.) There he uses the word *freehold* as contradistinguished from *copyhold*, and uses both where he meant both. And the exception refers to the *estates* which he had before given in those counties, and does not necessarily imply that he had before given all his freehold and *copyhold lands*, &c. in those counties, for in some of them he had no copyholds: and in the greater part of the copyholds he had only a remote reversion to dispose of. No new estate was

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meant to be paſſed by the exception. It is true that according to *Walter* v. *Drew* (*a*) an *eldeſt ſon* may take an eſtate tail by implication, upon a deviſe over in caſe he happen to die without *iſſue*; but that was in favour of the heir; and here all the daughters conſtituted but one heir at law of Lord *S.*, failing iſſue of his ſon; and therefore the Court would not diſinherit them but by expreſs words or neceſſary implication. But if the ſon took theſe copyholds in tail they would go over, in default of his iſſue, to all the daughters alike: or if they took by way of executory deviſe, it would avail the defendants equally.

Holroyd, in reply, obſerved as to the ſtate of the property, that whether Lord *Strafford* had a fee (as he ſuppoſed him to have in part) or only an eſtate tail, his having ſurrendered to the uſe of his will ſhewed an intention to diſpoſe of what he had. Theſe cuſtomary eſtates were diſtinguiſhed, as copyholds of *frank tenure*, from copyholds holden *at the will of the lord*, in the caſe of *Burrell* v. *Dodd* (*b*); and it was ſaid that in the former the *freehold* veſted in the tenant and not in the lord. In ſome manors the form of the admittance to tenant right eſtates is different, as in *The Duke of Somerſet* v. *France and Others* (*c*), where it was to hold ad voluntatem domini ſecundum conſuetudinem manerii; and there, upon the death of the admitting lord, the eſtate was altogether out of the tenant, though he had a right to be readmitted, paying his fine. In ſuch manors, therefore, where the eſtate paſſes by the mere admittance of the lord, without the grant of the tenant, the freehold may remain in the lord: but not where it paſſes by the grant of the tenant, and the ad-

(*a*) *Comyns' Rep.* 372. (*b*) 3 *Bos.* & *Pull.* 378.
(*c*) *Fortesc.* 41. and 1 *Stra.* 654.

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miffion is a mere recognition on the part of the lord. The tenant may have the *freehold* though the inheritance be in the lord. And this is fhewn by the form of pleading, where the tenant is faid to be *feifed* of the eftate, which muft be an eftate of freehold; but it is alfo faid to be *parcel of the manor*, infomuch as the inheritance is in the lord; though by the cuftom the heir has a right to claim admittance: and they are pleadable as eftates defcendible from anceftor to heir. Such cuftomary eftates, Lord *Hardwicke* fays, in *Huffey* v. *Grills* (a), never were of bafe tenure; and Lord *Coke*, in his *Copyholder*, ftates them to be of frank tenure. And though Mr. Juftice *Blackftone* confiders them otherwife in his treatife, in order to fhew that fuch tenants were not entitled to vote for knights of the fhire; yet that is not fupported by the cafes cited, and was not neceffary for the purpofe of his argument; for none were entitled to vote at a county election but the freeholders who were bound to attend the county court: and thefe tenants in ancient demefne being privileged from fuch attendance would not have a right of voting, though their tenure was clearly freehold.

Cur. adv. vult.

Lord Ellenborough C. J. now delivered the judgment of the Court. After ftating the cafe—

Upon the argument of this cafe two principal points were contended for on behalf of the plaintiff; the firft was, that in the furrender by *Thomas* Earl of *Strafford*, on the 10th of *April* 1732, to the ufe of his will all his cuftomary eftates, as well thofe which were *uncompounded* as thofe which were *compounded*, were comprehended. The fecond point was, that by the devife of

(a) *Ambl.* 301.

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"all his *freehold* manors, messuages, lands, tenements, and hereditaments in the counties of *York*, *Nottingham*, *Lincoln*, *Northampton*, *Suffolk*, *Kent*, and *Middlesex*, or elsewhere in *Great Britain*," the *customary* lands, the subject of this ejectment, passed.

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As to the first question which has been made upon the effect of the surrender; the cases cited from *Cro. Car.* 447., *Dyer*, 376., and Sir *Wm. Jones*, 435., were relied on by the plaintiff's counsel, for the purpose of shewing that the surrender extended to the *uncompounded* as well as the *compounded* copyholds. But these cases appear very distinguishable from the present. The first of them, which is the case of *Blague* v. *Gould*, was a devise of a corner house in *Andover*, described as being in the tenure of *Benson* and *Hitchcock*, whereas it was in fact in the tenure of one *Benson* and one *Nott*; the devisor also having another house, thereto near adjoining, in the tenure of *Hitchcock*. And it was holden that the corner house, in the tenure of *Benson* and *Nott*, passed; for that was the devise of a thing sufficiently ascertained by the words "*corner house*:" and there the intent was apparent that the corner house should pass in whosever tenure it might happen to be. And the same case is further reported as again argued, and finally adjudged, *Cro. Car.* 473., where it is said that the addition in tenurâ of *Hitchcock*, although it be not in his tenure, and be a mistake, yet it is but surplusage; and, although false, shall not vitiate the devise; because the devise was of a thing certain at first, and shall be expounded according as the intent of the parties is apparent. The case of *Wyndham* v. *Wyndham*, *Dyer*, 376. was the case of a feoffment of a house, lately of RICHARD *Cotton* in *D.*; which was false, the owner being THOMAS *Cotton*. The feoffor had no other house in *D.*, and the

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tit. *Releafe*, 11. The cafe of the Vicars Choral of *Litchfield* v. *Eyres*, in Sir *W. Jones*, 435. was a grant of all the tithes belonging or appertaining to them as appropriators of a certain parifh, "all which were lately in the occupation of one *Margaret Peto*, widow, deceafed." And there it was holden that all tithes belonging to the rectory paffed, though none, or only a part, had been in the poffeffion of *Margaret Peto*. This cafe, according to the report of it in *Cro. Car.* 546. and 2 *Roll. Abr.* 52. *pl.* 26., was decided on the ground, as ftated in *Rolle*, "*that thefe words were words of fuggeftion or affirmation, and not of reftriction or limitation, becaufe the fentence was perfect before*," and the words *all which*, &c. commence a new fentence, and are not a part of the firft or general fentence; and, as faid in the report in *Croke*, the word *all* fo disjoined cannot be a reftriction, but an explanation. But here there can be no queftion whatever but that the words "*being of the yearly rent of* 4*l.* 10*s.* 8½*d. and compounded for*" are part of the general fentence: and where there is no disjoining or divifion in the words or fenfe, but the whole is one entire fentence, the one part may well reftrain the other. And the cafes, cited by Mr. *Walton* for the defendants, of *Gafcone* v. *Barker*, 3 *Atk.* 9., and *Wilfon* v. *Mount*, 3 *Vef. jun.* 191., fully fhew that what is mere allegation may, if confiftent, operate as a reftriction. We are therefore, upon thefe authorities and confiderations, of opinion that the words "*and compounded*" operate by way of reftriction in the prefent cafe, and confine the furrender, in point of effect, to that defcription of copyholds then belonging to the furrenderor; and that the words "*yearly value of* 4l. 10s. 8½*d.*," being referable to no actual amount of rents in this cafe, cannot qualify or impugn this reftriction.

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As to the second question; it appears by the case that Lord *Strafford*, at the time of making his will, was seised of considerable *freehold* estates in the counties of *York*, *Nottingham*, *Lincoln*, *Middlesex*, and elsewhere in *Great Britain*, and that he was also seised of certain *customary tenements* in the manor of *Wakefield*, in the county of *York*; of some part of them in tail male, of other part in tail general, and in fee of the reversions, and of other customary lands in fee; and besides these, that he was seised of some *copyholds* in *Middlesex*, which were such in the strictest sense of the word. These customary lands in *Yorkshire* are by the surrender, which it is insisted comprehended them, described as being *holden* of the lord *of the manor of* Wakefield *by copy of court-roll*; and the lessor of the plaintiff himself has obtained a mandamus from this Court to admit him to the lands for which this ejectment is brought, describing them as COPYHOLD *lands within the manor of* Wakefield, whereof *Thomas* Earl of *Strafford* died seised. It is also stated by the case that the manor of *Wakefield* is ancient demesne, and that the customary tenements of the manor are *demised and demiseable by copy of court-roll of the said manor*; that they have always been called and reputed *copyholds*; but that none of the admittances state the tenants to hold *at the will of the lord*. It appears also by the case, that in the reign of *James* I. certain proceedings were had in the duchy court of *Lancaster*, in which the matters in dispute were, whether the fines payable to the lord were fines arbitrary or not, and whether the grants which some of the tenants had obtained of the waste were valid: and that in all those proceedings the estates of the tenants were considered as *copyhold* tenements demised and demiseable by copy of court-roll according to the custom of the manor. In addition

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dition to this it does not appear that Lord *Strafford* had any other lands in *Yorkshire* holden by copy of court roll. Lord *Strafford* being thus circumstanced with respect to his property, the question before us is, What did he mean to pass by that part of his will in which he speaks of his *freehold* lands, tenements, and hereditaments? In the course of the argument it could not be contended, if Lord *Strafford* had been seised of what the counsel for the lessor of the plaintiff allow to be *copyhold* lands which had lain in *Yorkshire*, that the devise would have comprehended them under the denomination of *freehold*. And in order to get rid of the effect of that word *freehold*, which applies to his lands in *Yorkshire*, as well as to those in the other enumerated counties, it has been insisted that the premises in question are property of that description of freeholds which are called *customary freeholds*. And many cases and authorities have been cited to shew that customary tenants, who do not hold at the will of the lord, are not *copyholders*, but *freeholders*. But without going into the learning respecting tenants in ancient demesne, and other tenants who hold by copy of court-roll according to the custom of the manor, though not at the will of the lord, (the whole of which is collected by Mr. Justice *Blackstone* in his Considerations on Copyholders,) we think, upon this occasion, as the customary lands in question are demiseable by copy of court-roll, have always been called and reputed *copyhold*, and that such of them as the testator himself surrendered to the use of his will were described by him expressly as holden by copy of court-roll, that he cannot be understood as having intended to pass them under the description of *freehold* lands. In disposing of their property testators usually advert to the known and ordinary circumstances attend-

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ing it, and adopt the appellations by which it is generally and more familiarly distinguished; and cannot be supposed to regard or consider those equivocal or less obvious qualities of their estates, about the effect of which profound lawyers and legal antiquaries might entertain controversies (a). The distinction between estates which may be immediately transferred from man to man by deeds and instruments executed merely between the parties themselves, and those estates, the titles to which are evidenced by copies of the rolls of the courts baron of different manors, is familiar even to men the least acquainted with the rules of property: but the distinction, and still more the effect of the distinction between tenants by copy of court-roll *at the will of the lord* according *to the custom of the manor*, and tenants *by copy of court roll* simply *according to such custom*, as determining the one to have a freehold interest, and the other not, is a distinction not at all likely to occur to persons in general when disposing of their property; or to be adopted by them if it did occur. If Lord *Strafford*, having made due surrenders to the use of his will, had devised *all his copyhold estates in* Yorkshire, there could be no question made but that those estates which are now contended to be *freehold* would have effectually passed under the above description, *i. e.* as *copyhold*. If the language of this will is attended to, it will be found that where the testator meant to pass or charge his estates without any regard to their quality or tenure, he has used words which, in their generality, would comprehend *all*, without adding others which might, by construction, operate to narrow or restrain their meaning. In the introduction to his will he speaks of his *worldly estate*; a most comprehensive term, extending to

(a) Vide *Wilson's Rep.* 354.

property

property of every defcription. To his wife he devifes an annuity out of all his *real eftate*, in lieu of her dower or thirds at common law, which fhe might otherwife claim out of any part of his real eftate which he had been or fhould or might be feifed of during their intermarriage; words of meafured extent and caution peculiarly fitted for the purpofe he had in view. To his mother he gives an annuity out of all his *real* and perfonal eftate, in lieu of her jointure, dower, or thirds at common law, and all other demands out of the *real* and perfonal eftate of her late hufband. After which comes the devife upon which the queftion arifes, in which the teftator no longer ufes expreffions of a generality calculated to carry *all* his lands in the enumerated counties, but only thofe which are *freehold*; accompanied by a devife by name of *two copyhold meffuages in* Twickenham; marking thereby a knowledge, on his part, that in order to pafs thofe copyholds at leaft the words he had ufed before were infufficient. The remaining part of the will furnifhes no argument of intent to be drawn from the ufe of any particular expreffions until we come to the refiduary claufe, which the counfel for the leffor of the plaintiff contends to have furnifhed an argument in his favour, from the circumftance of thefe cuftomary lands being undevifed until after failure of the iffue of his fon Lord *Wentworth*, and of his, Lord *Strafford*'s, own body, unlefs they are comprehended under the defcription of *freehold* lands; which it is faid he never could have intended from the introduction to his will, where he profeffes an intent to difpofe of all his worldly eftate. But in anfwer to this it has been juftly faid that there will be no inteftacy if the heir at law, according to the cafe of *Walter* v. *Drew*, in *Comyns's Reports*, took an eftate tail by implication. And it would be car-

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rying the effect of introductory words much further than has been hitherto done, if they should be so construed; for though they have been holden to ascertain the extent of an estate in lands unquestionably devised, we are not aware of any case which has decided that such introductory words will alter the obvious and natural construction to be put on words used by a testator, which of themselves admit of no doubt, unless indeed the context should necessarily and absolutely require such sense to be put upon them; which is not the case in the present instance. But this residuary clause furnishes, from the penning of it, an additional argument, that the testator's intent was confined to what were, according to common understanding, *freehold* lands: for after, in certain events specified in that clause, devising all his said manors, lands, and hereditaments in the counties of *Lincoln* and *Nottingham* to his three daughters *Anne*, *Lucy*, and *Harriott*, he devises all other his manors, messuages, lands, tenements, and hereditaments whatsoever, either *freehold or copyhold*, (except those in the counties of *York*, *Lincoln*, and *Nottingham*, which he had before devised) to his three daughters; again marking the distinction between *freehold* and *copyhold* estates, and shewing that where he meant to pass *copyhold*, he felt it necessary so to describe it. Upon the whole, therefore, we are of opinion that no sufficient argument arises, either from the introductory words, or from any other part of the will, which will warrant us in annexing to the word *freehold*, as it occurs in the devise in question, any other meaning than that which, in the ordinary understanding of a common testator, it would naturally and obviously bear; and still less so in the case of a testator conusant, as this testator appears to have been, of the proper nature, quality, and denomination of

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the different species of property he professes to dispose of by his will. For these reasons we are of opinion that the defendants are entitled to judgment.

Postea to the Defendants.

DOE, on the several Demises of STEVENS and PAIN, *against* SNELLING and Others.

Friday, April 27th.

One devised thus: "Concerning my worldly estate, I give and bequeath to *M. M.* 1*s.* "*Also I give and bequeath* to *A. M.* 2*s.*" (with pecuniary bequests to several others in the same form of words); "*also I give and bequeath to* G. S. my messuage and land, &c. in *W.* *Also I give and bequeath* to the said *G. S.* and his wife all my lands, &c. in *B.* *also* all my messuages, &c. in *W.* *also* all my goods, chattels, &c. and personal estate, *after having thereout first paid and discharged* all my *debts and funeral expences: also subject to the payment thereout all the aforesaid legacies.* And I nominate the said *G. S.* to be *sole executor, whom I charge* with the payment of my debts, legacies, and funeral expences," &c. Held that *G. S.* and his wife took a fee in the real estate devised to them, by reason of the words "*having thereout first paid* all my *debts*," &c. which was a personal charge on them in respect of the realty as well as personalty, all devised in one entire sentence, together with such charge.

IN ejectment to recover certain premises in *Bramley* and *Wonersh* in the county of *Surry*, tried before Lord *Ellenborough* C. J. at the last assizes for that county, a verdict was taken for the plaintiff, subject to the opinion of the Court on this case.

Sarah Dabner, late of *Wonersh* in the county of *Surry*, widow, deceased, being seised in fee (amongst other things) of the premises in question, by her will, dated the 27th of *July* 1785, duly executed and attested, devised as follows: "Concerning my worldly estate, I give "and dispose thereof as follows, (viz.) I give and be"queath unto *Michael March* of, &c. 1*s.*: also I give "and bequeath unto his wife *Ann March*, 2*s.*: also I "give and bequeath unto *Elizabeth Stevens* of, &c. 50*l.* "(with other bequests in the same form of words.) All "which said sums to be respectively paid in 12 months "after my decease. Also, I give and bequeath unto "*George*, *Elizabeth*, and *Sarah*, son and daughters of the "above-named *George Stevens*, 10*l.* each, to be paid unto "them when they shall respectively arrive at the age of "21 years, (and if either of them die before 21, their

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" ſhare to be paid to the ſurvivor.) Alſo, I give and bequeath unto *George Snelling* of *Bramley* in the ſaid " county, cordwainer, all that my meſſuage or tenement, " malt-houſe, garden, land, and premiſes ſituate in the pariſh of *Wingrove*, in the county of *Bucks*. Alſo, I give " and bequeath unto *the ſaid* George Snelling *and* Sarah " *his wife* all that my meſſuage or tenement, farm, lands, " and premiſes ſituate in *Bramley* aforeſaid: alſo, all that " my meſſuage or tenement, garden, and premiſes ſituate " in *Wonerſh* aforeſaid, and now in my own occupation: " alſo, all and ſingular my goods, chattels, rights, credits, " ready money, and *perſonal eſtate* of what nature and kind " ſoever as I ſhall die ſeiſed and poſſeſſed of, intereſted " in, or entitled unto, *after having thereout firſt paid and* " *diſcharged all my juſt debts and funeral expences:* alſo ſubject *to the payment thereout* all the aforeſaid *legacies*. " And I nominate, conſtitute, and appoint the ſaid *George* " *Snelling* to be *ſole executor* of this my laſt will and teſtament, *whom I charge with the payment of all my juſt debts*, " *legacies, and funeral expences*."

The leſſors of the plaintiff are heirs in coparcenary to *Sarah Dabner* the teſtatrix. The defendant *George Snelling* is the infant ſon and heir at law of *George Snelling* the deviſee, who ſurvived *Sarah* his wife, and died in poſſeſſion of the premiſes in queſtion in *February* 1803. The other defendants are tenants in poſſeſſion of the premiſes. The queſtion for the opinion of the Court was, whether the plaintiff were entitled to recover.

Lawes for the plaintiff. There being no words of limitation or inheritance annexed to the ſeveral deviſes to *George Snelling*, and to him and his wife, no more than an eſtate for life or lives paſſed by the expreſs words of the will.

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will. But it will be ſaid that the ſubſequent charge on *George Snelling* to pay the debts and legacies will carry the fee. That would be ſo, if it were a charge on him in reſpect of the realty before deviſed to him, according to the authorities, in order to enable him, if neceſſary, to ſell, and carry into effect the purpoſes of the will. But a charge for the payment of debts muſt always be conſtrued with reference to the rules of law for the payment of debts, which the teſtator muſt be taken to have had in contemplation, if he have not otherwiſe expreſſed himſelf. Where the charge therefore is in general terms upon one who is named *executor*, and to whom eſpecially the perſonal eſtate is immediately before bequeathed, it muſt be preſumed that the payment was intended by the teſtator to be made out of that fund which the law firſt appropriates to the payment of debts. It was ſo conſidered by *Groſe* J. in *Denn* d. *Moor* v. *Mellor* (*a*), where a bequeſt of the reſidue of lands and goods *after payment* of debts, &c. was holden not to carry a fee. So it was alſo ruled in *Dickins* v. *Marſhal* (*b*), *Canning* v. *Canning* (*c*), and *Merſon* v. *Blackmore* (*d*). In the latter the Maſter of the Rolls laid ſtreſs on the charge not being at all events on the realty, but only conditionally in caſe the perſonalty was not ſufficient. This is diſtinguiſhable from *Doe* d. *Palmer* v. *Richards* (*e*), which was a deviſe of the reſidue of lands and goods, the teſtator's legacies and funeral expences *being* THEREOUT *paid*. For there, the whole was one continued deviſe, in one unbroken ſentence; and it could not be taken to refer more to the perſonalty than the realty; but the word *thereout* neceſſarily over-rode both ſpecies of property. But here the realty is firſt de-

(*a*) 5 *Term Rep.* 564. (*b*) *Cro. Eliz.* 330. (*c*) *Moſ.* 249.
(*d*) 2 *Atk.* 341. (*e*) 3 *Term Rep.* 356.

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vised in one complete sentence; and then the personalty, beginning with the disjoining word *also*, with which the testator had before commenced every separate bequest. And then *also* occurs again in the clause subjecting the property to the payment *thereout* of the legacies. And then *George Snelling* is by a substantive clause appointed sole *executor;* in which character only the charge upon him of the payment of debts attaches; which must therefore be meant out of the personalty. So in *Hopewell* v. *Acland* (*a*), where the devise was, "*Item*, I devise my "manor of *B.* to *A.* and his heirs. *Item*, I devise *all* "my lands, &c. to the said *A.* *Item*, I devise all my "goods and chattels, and *whatever else I have not before* "*disposed of*, to the said *A.*, *he paying my debts and legacies;*" and *A.* was made executor: *Trevor* C. J. said, that "*Item* was a usual word in a will to introduce new distinct matter; therefore *a clause thus introduced is not influenced by nor to influence a precedent or subsequent sentence*, unless it be of itself imperfect and insensible without reference; and therefore not here, where both clauses are perfect and sensible. But by reason of the concluding sentence devising *what was not before disposed of*, he held that *A.* took a fee." So in *Doe* v. *Holmes* (*b*), where the devise was of "my house and furniture to *A.*, whom I make executrix, she paying all my debts and legacies," which was deemed to carry the fee; Lord *Kenyon* laid stress on the circumstance that the *personalty* was separately given to *A.* by the next clause in the will, viz. "I likewise leave to *A.* all the rest of my personal estate." It is also material in this case that the charge is not upon the same persons who take the realty: for the charge is upon *George Snelling* alone in the same clause in which he is appointed executor;

(*a*) *Salk.* 239.

(*b*) 8 *Term Rep.* 1.

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cutor; but the realty was given to *George Snelling* and his wife; and though it be there given them "*after having thereout first paid* the debts," &c., yet that refers to the *personal* estate which is given by the same clause: and the subsequent direction that the debts, &c. shall be paid by *George Snelling* the *executor*, shews in what character the charge was first imposed, and out of what fund it was to be satisfied.

Bosanquet contrà was stopped by the Court.

Lord ELLENBOROUGH C. J. The question is, whether *George Snelling* and his wife, the devisees, took the fee or only an estate for life in the lands and premises in *Bramley* and *Wonersh*. The testatrix, after giving several pecuniary legacies, first disposes of her messuage, &c. in the parish of *Wingrove*, which she devises to *George Snelling* alone. And that may probably be contended to pass only a life estate to him, if any question should arise upon it. Then she devises to *George Snelling* and his wife the premises in *Bramley*, *also* the premises in *Wonersh*: those two estates, it is to be observed, are disposed of in the same continuing and entire sentence; for the words, "*I give and bequeath*" are not repeated, and must necessarily therefore extend to the subsequent part of the sentence in order to make it intelligible. The sentence then goes on, "also all and singular my goods, chattels, &c. and personal estate of what nature and kind soever as I shall die *seised* and *possessed of*," &c. Here again the continuity of the sentence is evinced; for having first devised the realty and then the personalty, the word *seised* appears to have been used as applicable to the realty, and *possessed* as applicable to the personalty. And then the sentence,

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after difpofing of both fpecies of property, concludes thus; "*after having thereout firft paid and difcharged all my juft debts and funeral expences; alfo fubject to the payment thereout*" (repeating again the word *thereout*) "*all the aforefaid legacies.*" The queftion then is, whether the fee be not given by neceffary implication from thefe concluding words, which impofe a charge upon the devifees of the payment of debts, legacies, and funeral expences, which a lefs quantum of eftate might not be fufficient to fatisfy. I take the rule to have been laid down by Lord *Kenyon*, in *Doe* v. *Mellor*, and *Doe* v. *Holmes*. The queftion has always been, whether the charge is to be paid only out of the rents and profits of the eftate, or whether it is to be paid by the devifee at all events. Where debts or annuities are to be paid by the devifee at all events out of the eftate in his hands, the devifee muft take a fee; otherwife the charge might be greater than the eftate devifed, and he would be a lofer. For if he only took an eftate for life, the debts, &c. might be payable before the rents became due, and he might not live long enough to reimburfe himfelf. But where the charge is only payable out of the rents and profits, there the devifee cannot be a lofer, as he cannot be chargeable with more than he has received. The diftinction therefore turns on this; whether the charge be on the *perfon* of the devifee, or only on the *property* devifed. Now here the eftate is devifed to the devifees with a direction *thereout* to pay debts and funeral expences. That brings the queftion to the grammatical conftruction of the fentence, "*after having* "THEREOUT *firft paid and difcharged all my juft debts and* "*funeral expences: alfo fubject to the payment* THEREOUT "*all the aforefaid legacies.*" The payment thereout is to be made *by the devifees;* and the word "*thereout*" means

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out of the property before given to the devisees. What then was the property before given? All at least which was before included in the same sentence. And in order to make it sense we must read it as one entire sentence, beginning at the words, "also, *I give and bequeath* unto "the said *George Snelling*, and *Sarah* his wife," &c.; for the words "*I give and bequeath*" occur only once. If then the sentence include the real as well as personal property, and the debts are to be *thereout* paid *by the devisees*, it differs this from the case of *Doe* v. *Mellor* (*a*), and that class of cases where the land is devised only *after payment* of debts: for there the thing itself is not given to the devisee till after those charges have been first satisfied. But where *the devisee* is to pay the charge *out of* the land, he must first take the interest in the land. This brings the case within that of *Doe* v. *Richards* (*b*), the doctrine and principle of which is right, though perhaps the words to which it was applied will hardly sustain the application, as was considered by many of the Judges on the decision of the case of *Moor* v. *Mellor* (*c*), in the House of Lords. That was a devise of lands, "his legacies and funeral expences *being thereout* paid:" and those words were holden to carry the fee, being considered the same as if the devisor had said "being *by him* (the devisee) *thereout* paid." And if those words had been added the application of the doctrine would unquestionably have been right. The doctrine, however, has been long established. In *Merson* v. *Blackmore*, the Master of the Rolls says that "where a gross sum is to be paid out of the lands, to be sure it gives a fee to the devisee of those lands." In *Doe* v. *Holmes* (*d*) the devisor gave his house and furniture to one

(*a*) 5 *Term Rep.* 558., and 2 *Bos. & Pull.* 247.
(*b*) 3 *Term Rep.* 356. (*c*) 2 *Bos & Pull.* 252. (*d*) 8 *Term Rep.* 1.

whom

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whom he made executrix, "*ſhe paying* all his debts and legacies." Lord *Kenyon* ſaid that the deviſee was bound to pay the debts and legacies at all events, and the charge was thrown on her in reſpect of the real eſtate. The ſentence here is not framed as in *Hopewell* v. *Ackland* (*a*). There each ſentence beginning "*Item, I deviſe,*" &c. was complete and diſtinct in itſelf; and the words "he paying my debts and legacies" included under the laſt item, was more disjointed from the preceding items than in this caſe, where it is all coupled together with the deviſe of the realty, in one ſentence. Then the only remaining queſtion is, Whether the ſubſequent appointment of *George Snelling* to be ſole executor, and charging him with the payment of all the debts, legacies, and funeral expences, can make any difference, the deviſe of the land having been before made to him and his wife with the ſame charges upon them? I cannot conſider theſe words as importing that he ſhould do more than the law would have required of him if the words had not been added. And upon the whole, I am clear that the debts, &c. were perſonal charges upon the deviſees in reſpect of the property deviſed to them, and that they muſt take an eſtate commenſurate with the charges, which they cannot be certainly aſcertained of without taking a fee in the lands.

Grose J. The word *thereout* impoſes a duty on the deviſees to pay the debts and legacies thrown on them in reſpect of the property out of which they were required to pay them. I doubt whether by the word *alſo* the teſtator did not mean *and.* The ſentence would then read thus, (after giving the eſtate in *Buckinghamſhire* to *George Snelling* alone): "Alſo I give and bequeath unto the ſaid

(*a*) *Salk.* 239.

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" G. S. and *Sarah* his wife all that my meſſuage, &c. in " *Bramley*; *and* (vice *alſo*) all that my meſſuage, &c. in " *Wonerſh*, &c. *and* (vice *alſo*) all and ſingular my goods and " chattels, &c. *after having thereout firſt paid my juſt debts*," &c. It would then be read as one plain ſentence, by which the realty and perſonalty would be deviſed, the deviſees paying *thereout* the teſtator's debts, &c.; and therefore, according to caſes well known, the deviſees would be bound to pay the debts out of the real as well as the perſonal property; and both deſcriptions of property having been given to the huſband and wife, the teſtator, in directing that his debts ſhould be *thereout* paid, muſt have meant that they ſhould pay them out of both thoſe deſcriptions. As to the appointment of the huſband alone to be executor, and charging him again with the payment of the debts, &c. nothing can be collected from thence to ſhew a different intent in the deviſor. The intereſt was given to both huſband and wife, and as the huſband would take an intereſt in the property given to his wife, and he was probably regarded as the perſon who would take on himſelf the active duty, it was natural to impoſe on him the burthen of the executorſhip, and the payment in fact of the ſeveral charges. But it is clear that the realty was meant to be charged as well as the perſonalty. Then ſaying that the deviſees took a fee in reſpect of ſuch charge is, I believe, giving effect to the real intention of the teſtatrix. For where an eſtate is given to a party without limiting it for his life or other definite period, it is pretty generally conſidered, by perſons not acquainted with the rules of law, that the whole intereſt of the teſtator paſſes; and here we do find words in the will which may carry that intention into effect conſiſtently with law.

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Lawrence J. The diſtinction which runs through the caſes ſeems to be this, that if an eſtate in land be given *after payment* of debts or legacies, it is of no conſequence for this purpoſe whether the deviſee take the eſtate for life or in fee; for the land will be charged into whatever hands it may paſs, and the purpoſes of the deviſor will equally be anſwered. But where an indefinite eſtate is given to a perſon in lands, and that *perſon* is charged with the payment of debts or legacies, he muſt take a fee; for otherwiſe, if he take only for life, and pay the charges, and die ſoon after, he may be a loſer, which the deviſor could never have intended. It is the ſame thing if ſuch indefinite eſtate be given to one, and the debts are to be paid *out of the eſtate* given to the deviſee. he muſt there alſo take the fee; for otherwiſe the *eſtate* may not be ſufficient to pay the debts. This was eſtabliſhed in the caſe of *Doe* v. *Richards*, where Lord *Kenyon* relied on the words, "my legacies and funeral expences being *thereout* paid," as giving a fee; aſſigning this reaſon, "for the fund which is "to anſwer thoſe demands ought to be as ample as poſſi-"ble." And again, in *Goodright* d. *Baker* v. *Stocker* (*a*), where one deviſed to his grandſon *J. B.* a dwelling-houſe, "paying yearly *out of the ſaid dwelling-houſe* 15*s.* to his "grand-daughter *A. H.*;" there the words "paying "yearly *out of* the ſaid dwelling-houſe," &c. were deemed to carry the fee, becauſe the annuity to *A. H.* might continue longer than the life of the deviſee. Then the queſtion is, whether the debts and legacies here be not payable out of the real eſtate deviſed to *George Snelling* and his wife? It is contended, that they are only payable out of the perſonal eſtate, upon the authority of the caſe of *Hopewell* v. *Ackland*. But there the ſeveral deviſes of the

(*a*) 5 *Term Rep.* 13.

real

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real and personal estate were distinct and independant. Here the words carrying the personal estate do not constitute by themselves a perfect sentence: they require a verb: and therefore to make them intelligible they must be read altogether as one sentence with the antecedent branch which has the verb, "also *I give*," &c. Therefore I agree with my brother *Grose* in thinking that *also* at the commencement of the bequest of the personalty means no more than *and*. Then for the meaning of the word *thereout* ("after having *thereout* first paid," &c. and "also subject to the payment *thereout*," &c.) we must look to the whole of the antecedent part of the sentence, and that refers to the *real* as well as the *personal* estate given. But it is said, that at the conclusion of the will *George Snelling* only is charged with payment of the debts and legacies: but that is only what the law would have implied so far as respects the personalty from his character of executor, and the express mention of it cannot have the effect of altering the estate which was before given him. The real and personal estate had been before given to him and his wife by a distinct clause, charged with the payment of debts and legacies out of it. The husband then was made as it were what is called, and was not uncommon in old wills, a supervisor of the will, to see those things done which were before charged on the estate given to him and his wife. A question might indeed be raised whether he did not take a fee in the whole, as well in that estate which was given to him alone in another clause, as in that which was given to him and his wife jointly, if he alone were personally charged with the payment of debts and legacies in respect of every thing before given to him: but I do not give any opinion on that point; it is enough in this case to say, that he and his

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wife took a fee in the lands in queſtion, which were liable *in his and his wife's hands* for the payment of the debts and legacies.

Le Blanc J. According to all the determinations, the queſtion, whether the deviſee take the fee or not in reſpect of charges, muſt depend on this, whether *he perſonally*, or the eſtate given *to him*, be charged with the payment of debts; or whether the *eſtate* be given *after* payment of debts? If the deviſee be perſonally charged with the payment of debts, or if the debts be charged on the quantum of eſtate given to the deviſee, he muſt take the fee; otherwiſe if he only take for life he may be a loſer, or the eſtate may be inſufficient. Here the deviſe of the eſtates in queſtion, and alſo of the perſonalty, is all contained in the ſame clauſe; for the words, "*I give and bequeath*," are not repeated before that branch of it diſpoſing of the perſonalty; and then the clauſe concludes with charging *the deviſees* with payment *thereout* of the debts and legacies. The words are, "after *having thereout* firſt paid," &c. Theſe words are ſtronger than the words, "my legacies, &c. *being thereout* paid," which occurred in *Doe* v. *Richards* (*a*). For "after *having*," &c. means "after *they* ſhall *have thereout* paid," &c., namely, *G. Snelling* and his wife, to whom the property was given. The debts, &c. therefore became a perſonal charge upon the deviſees, who were required to pay them out of the property deviſed to them. And what that property was can only be aſcertained by referring back to the beginning of the ſentence, where the teſtatrix uſes the words, "I give and bequeath," without which the ſentence cannot

(*a*) 3 *Term Rep.* 356.

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be perfected. The last clause is then resorted to, in order to shew that the testatrix only meant to charge *G. Snelling* the husband, in respect of the personalty, as *executor*. But according to my construction she had before specifically charged the devisees of the real property in question with the payment of debts and legacies, and they were therefore chargeable in respect of it, if the personalty had not been found sufficient. In order to make the latter part of the will consistent with the former, it must be taken as a direction to her executor to see those things done which she had before directed to be done. As well therefore on the authority of the cases referred to as also on that of *Baddeley* v. *Leppingwell* (*a*), I think that the devisees took a fee. In the latter case the devise was to *S. B.*, "*she paying thereout* 40*s.* a year to her sister *E. B.*" This was considered as a devise of an annuity of 40*s.* a year, to be paid by the devisee to the sister for life, and that it carried the fee to the devisee, who was charged with that annuity.

Postea to the Defendants (*b*).

(*a*) 3 *Burr.* 1533. (*b*) Vide *Goodtitle* v. *Maddern*, 4 *East*, 496.

Baring and Others *against* The Royal Exchange Assurance Company.

Friday, April 27th.

THIS was an action against the underwriters on a policy of assurance for 5000*l.* on goods, being one half of the cargo, *warranted* American *property*, on board the

Where a foreign Court of Prize professes to condemn a ship and cargo on the ground of an *infraction of treaty*, in not being properly documented, &c as required by the treaty between the captors and captured; such sentence is conclusive in our courts against a *warranty of neutrality* of such ship and cargo in an action upon a policy of insurance against the underwriter; although inferences were drawn in such sentence from ex parte ordinances in aid of the conclusion of such infraction of treaty.

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Rosanna, warranted an American *ship*, from *Surinam* to *London, Rotterdam, Amsterdam*, or *Hamburgh*, with liberty to touch at *Guernsey*, or one port in the Channel. The policy was effected by the plaintiffs as agents of *N. Sargent*, in whom the interest was averred to be, at a premium of ten guineas per cent. The declaration averred a loss by capture; and the defendants pleaded the general issue. At the trial before Lord *Ellenborough* C. J., at *Guildhall*, the jury found a verdict for the plaintiffs for 5000*l.*, subject to the opinion of the Court upon the following case:

On the 7th of *September* 1796, the *Rosanna*, an *American* ship, sailed from *Surinam* on the voyage insured, with her cargo, the property of *N. Sargent*, who was admitted to be an *American*, unless the *French* sentences of condemnation hereinafter stated preclude the plaintiffs from proving him such. On the 23d of *October* 1796 she was captured by a *French* privateer, and carried into *Rochelle*. At that place proceedings were instituted against the ship and cargo before the Tribunal of Commerce; which adjudged both to be restored to the owners. But on appeal by the captor the Court of Appeal reversed the former sentence, and condemned the ship and cargo. [Here was introduced the *French* sentence, which began with an exordium on the duty of neutrals to submit themselves to the maritime laws, and referring to the *French* ordinances of 1704, 1744, and 1778, and declaring that their authority was recognised by the law of the 14th of *February* 1793, and the arret of the Directory of the Executive Power of the 12th *Ventose*, after which the sentence proceeded as follows:] "Considering that the treaty between *France* and the *United States*, of the 6th of *February* 1778, contains no clause contrary to the foregoing ordinances, and

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and that they are of courſe binding on both the *Americans* and other nations: conſidering that *J. P.*, captain of the *Roſanna*, has not produced a liſt of the crew ſigned by the marine officers of the port of *New York*, from whence he failed: conſidering that it is not poſſible to give credit to what he has ſaid, that in his country there is no public officer appointed to certify the liſts of crews, ſince in the treaty of 1778, between *France* and the *Americans*, mention is made of marine officers to whom captains of *American* ſhips are bound to tranſmit the liſts of their crews, and to fulfil ſuch other formalities as are inſerted in the 25th article of the ſaid treaty: conſidering it poſſible to admit that the ordinance of the 26th of *July* 1778, and the preceding ones, could not be oppoſed to the *Americans*, under pretence that the regulations therein contained had not been recogniſed in the aforeſaid treaty, it is at leaſt indiſputable that they ought to fulfil the obligations which this treaty preſcribed to them, and that by not doing ſo they ſubject themſelves to the penalty of confiſcation: Now by the 25th article of the ſaid treaty it is agreed, in order to remove and to prevent, on both ſides, diſſentions, in caſe either of the two parties ſhould be engaged in a war, that the veſſels belonging to the ſubjects or people of the other ally muſt be provided with ſea-letters or paſſports, which ſhall expreſs the name, the property, and the burden, as alſo the name and reſidence of the maſter of the veſſel, in order that it may thereby appear that ſhe really belongs to the ſubjects of one of the two contracting parties; which paſſport muſt be expedited according to the model annexed to the preſent treaty. The terms of this model, and the formalities to be obſerved by thoſe who are bound to take them, are as follows: "The maſter of the ſhip ſhall tranſmit to the officers of marine a liſt,

 ſigned

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signed and attested by witnesses, containing the names and surnames, places of nativity and of abode of the persons who compose the crew of his ship, and of all those who shall embark therein, &c. (It then negatived that the captain had transmitted the list or roll of the persons who composed his crew to the marine officers of *New York*, or caused it to be attested by witnesses; which was an infringement of the treaty.) Considering that it was necessary to stipulate these formalities, because they serve to prove whether the crew is composed of friends or enemies; and that in this point of view, so far from being contrary to the ordinances of 1704, 1744, and of 1778, they refer to and implicitly recognize them: considering that it is not sufficient for the captain of the *Rosanna* to assert his having transmitted the list of his crew to the marine officers of *New York*; that he is not obliged to have a duplicate thereof; and that his passport is sufficient to prove his neutrality, without producing a duplicate of the list in question, attested and certified by the marine officers, or by a certificate signed by them: because if the bare production of his passport were sufficient to prove his having conformed to the law, the two nations would never have made the putting of the list of the crew into the hands of public officers an express condition, &c. and every clause in a treaty ought to be carried into execution: considering that the pretended list of the crew produced by the captain and *Sargent* is a nullity, not being signed by any person, nor attested by any witnesses, and not being drawn up with any of the formalities which can give it credit or authenticity: considering that this pretended list of the crew was not transmitted to the marine officers at *New York*, and that it could so little avail the captain and *Sargent* in covering the fraud whereby

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they have rendered themselves culpable; because the same list certifies that of the 18 men who compose it, four were taken at *Surinam* and seven at *London*; from whence it follows that this crew was not found at *New York* with the approbation of the marine officers of that place, and that being composed of more than one third enemies, contrary to the express tenor of the regulations of 1704 and 1778, the capture of the ship *Rosanna* is just and lawful: considering that upon the supposition that the captain had lost, during his voyage, part or the whole of his crew, and that he had been obliged to recruit it either at *Surinam* or *London*, he ought at least, conformably to the 10th article of the regulations of 1704, to prove by a a public act the necessity he was under of forming a new crew; and not having done so is acting contrary to the law, and, consequently, that the capture of his ship is valid: considering, lastly, that although the captain prove that his vessel is *American*, that her cargo belongs to *Sargent*, an *American*, and her supercargo; that is not sufficient in the eyes of the law to restore his ship; because he has not fulfilled the necessary formalities; because he has infringed on the 9th article of the ordinance of 1704, as well as the treaty in the month of *February* 1778, in not having the list of the crew drawn up with the prescribed formalities; and because the list of the crew is formed of men, more than one third of whom are enemies to the *French* Republic." It then proceeded to reverse the sentence of the Court below; "declaring the capture of the ship *Rosanna* good and valid." From this sentence there was an appeal to the tribunal of cassation; by which Court the sentence of condemnation was ultimately affirmed. It was admitted that the above three courts were proper prize courts. The case then set out

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the 25th and 27th articles of the treaty of 1778 between *America* and *France*, and the form of the passport referred to in that treaty.

The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover? If the Court should be of that opinion, the verdict to stand; but if the Court should be of opinion with the defendants, then the verdict to be entered for the defendants.

Puller, for the plaintiffs, said, that this case was brought forward by the defendants, in order to review the decision in *Bird* v. *Appleton* (*a*), which he contended was directly in point with the plaintiffs. The *French* sentence of condemnation in that case is not set out in the report, which only states generally that the decision proceeded entirely on the ground that some of the *French* ordinances had been violated. But in truth there is the same reliance on the *French* ordinances in the present case as there was there, mingled in both cases with references to the treaty between *America* and *France*. And there it was expressly holden that the warranty of neutrality as an *American* was not falsified by the sentence of the *French* Court condemning the ship for navigating without the documents required by the *French* ordinances; although, in that case as well as here, the sentence professed to decide against the neutrality of the ship for want of proper documents.

Lord ELLENBOROUGH C. J. (stopping the argument.) Does not this sentence of condemnation proceed specifically on the ground of *infraction of treaty* between *America* and *France*, in the ship not having those documents with which,

(*a*) 8 *Term Rep.* 562.

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in the judgment of the *French* Court, the *American* was bound by treaty to be provided? I do not say that they have construed the treaty rightly; on the contrary, suppose them to have construed it ever so iniquitously, yet, having competent jurisdiction to construe the treaty, and having professed to do so, we are bound by that comity of nations which has always prevailed amongst civilized states to give credit to their adjudication where the same question arises here upon which the foreign Court has decided. After arguing for hours we must come to the same conclusion at last, that the *French* Court has specifically condemned the vessel for an infraction of treaty, which negatives the warranty of neutrality. Then having distinctly adjudged the vessel to be good prize upon a ground within their jurisdiction, unless we deny their jurisdiction, we are bound to abide by that judgment. Wherever a case occurs of a condemnation by a foreign Court on the ground of ex parte ordinances only, without drawing inferences from them to shew an infraction of treaty between the nation of the captors and captured, and referring the judgment of the Court to the breach of treaty, I shall be glad to hear the case argued; whether such ordinances are to be considered as furnishing rules of presumption only against the neutrality, or as positive laws in themselves, binding other nations proprio vigore.

GROSE J. The *French* Court have here decided upon the fact of neutrality, which they negative by their sentence.

LAWRENCE J. If this case could raise the question, Whether a condemnation of a neutral ship specifically for the breach of *French* ordinances could negative a warranty

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Baring and Others *against* The Royal Exchange Aſſurance Company.

ranty of her neutrality, I ſhould wiſh to have it turned into a ſpecial verdict, in order to have that point decided by the dernier reſort. But no ſuch queſtion can be raiſed where the *French* Court have profeſſed to decide on an infraction of treaty, however they may refer to their own ordinances in coming to that concluſion. In *Bird* v. *Appleton* the Court, (whether properly or not I will not now inquire,) did not conſider the ſentence of condemnation there relied on as negativing the warranty of neutrality. For we have always ſaid that if the foreign Court have decided expreſsly on the queſtion of neutrality, we ſhould hold ourſelves bound by their deciſion. [After referring to *Bird* v. *Appleton*] I do not ſay that the ſentence in that caſe may not have been miſunderſtood by us; but we certainly decided it on the ground that it was a condemnation proceeding ſolely on the *French* ordinances.

Le Blanc J. It has been long ſettled that foreign Courts of Admiralty may decide upon the conſtruction of treaties. And if they expreſsly condemn a prize for a breach of treaty, that is binding on our Courts where the ſame queſtion ariſes upon the propriety of that condemnation.

Park was to have argued for the defendants.

Poſtea to the Defendants.

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BORDENAVE *againſt* GREGORY.

Monday, April 30th.

In an action on the caſe for not accepting ſtock agreed to be transferred on requeſt, an averment that the plaintiff was ready and willing to transfer, and requeſted the defendant to accept the ſtock, which he refuſed, can only be ſatisfied by ſhewing an actual tender and refuſal, or that the plaintiff waited at the Bank on the day when it was underſtood that the transfer was to be made, until the cloſe of the transfer books, which was the lateſt time when the transfer could be made. Semble that in ſuch an action it is not neceſſary by the ſtat. 7 *Geo.* 2. *c.* 8. *ſ.* 6. for the plaintiff to ſhew that he transferred the ſtock to another at the near poſſible transfer day after default made by the original contractor, provided the ſtock were transferred before the action brought: though, if the plaintiff might have obtained more for the ſtock by a ſale on any intermediate day between the original default and the actual ſale, that will go in reduction of the damages ſuſtained by the plaintiff by ſuch default.

THE firſt count of the declaration ſtated that the plaintiff, on the 5th of *May* 1803, at, &c. was poſſeſſed of 1000*l.* ſtock 3 per cents, the ſaid ſtock, together with other capital ſtock of the plaintiff, then ſtanding in his name in the books of the Bank of *England;* and the plaintiff being ſo poſſeſſed, afterwards ſold to the defendant the ſaid 1000*l.* ſtock for 69¾*l.* per cent., and then and there promiſed the defendant *that he* (the plaintiff) *would transfer the ſaid* 1000l. *ſtock to the defendant in the ſaid books of the Bank upon payment by the defendant of the ſaid price for the ſame, when the plaintiff ſhould be thereto afterwards requeſted;* and *in conſideration of the premiſes, the defendant then and there promiſed the plaintiff to accept the ſame ſtock,* and pay for the ſame at the rate aforeſaid, *when the defendant ſhould be thereunto afterwards requeſted.* The plaintiff then averred *that he was ready and willing and offered to transfer the ſaid* 1000l. *ſtock to the defendant according to the form and effect of the ſaid contract, upon payment by him of the ſaid price for the ſame,* and *then and there requeſted the defendant to accept the ſame ſtock and pay the ſaid price,* &c. yet the defendant would not, *when ſo requeſted, or at any time,* accept the ſaid 1000*l.* ſtock, or pay the price, &c.; but then and at all times omitted and refuſed ſo to do, &c.; by reaſon whereof the plaintiff was obliged to ſell and transfer, and has ſold and transferred the ſaid 1000*l.* ſtock for a leſs price than that for which he had ſold the ſame to the defendant, viz. at 64*l.* per cent., being the beſt price he could obtain for the ſame, to the

plaintiff's

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plaintiff's damage of so much, &c. At the trial at *Guildhall* before Lord *Ellenborough* C. J., at the Sittings after *Hilary* Term last, the evidence, so far as it was material to raise the questions made, was that the contract for the sale of the stock was made on the 5th of *May* 1803, a little before 12 o'clock at noon; but there was no proof of any direct application made to the defendant to accept the stock on that day, nor was it shewn that the plaintiff had waited till the closing of the transfer books at the Bank for the defendant to appear and accept the transfer of it. But a few days afterwards an offer was made of the stock, which was then refused to be accepted by the defendant, alleging that the contract had been made under an impression of the truth of certain public intelligence of peace, communicated to the Lord Mayor, which afterwards turned out to be a forgery; in consequence of which a resolution had been entered into by the members of the Stock Exchange that all bargains made on that day should be rescinded (*a*). And in consequence of the defendant's refusal the stock was afterwards sold at an inferior price on the 12th of *May*, there having been no intermediate rise of the funds between the 5th and the 12th. After a verdict for the plaintiff for the difference, two questions, which had been made at the trial, were again raised on a rule for setting aside the verdict, 1st, Whether it were not incumbent on the plaintiff, in support of the allegations in his declaration, to prove either an actual tender of the stock and offer to transfer it on the 5th of *May*, the day on which it was contracted for; or that which was an equivalent in law, namely, that the plaintiff waited till the last moment of the day when the transfer books at the Bank were closed ready to have made the

(*a*) *Vide* the case of *Heckscher* v. *Gregory*, 4 *East*, 608.

transfer,

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transfer, if any person had been present on the part of the defendant to have accepted it? 2dly, Whether, in order to entitle the plaintiff to recover, it were not necessary for him by the stat. 7 *Geo.* 2. *c.* 8. to shew an actual transfer to some other on the *next* transfer day, (which was the 6th)? and whether a transfer on the 12th were sufficient, not having been made as soon as it might? With respect to this last question,

The Court reserved it for future consideration, when it might be put in a more solemn course of investigation in the shape of a special verdict, or upon a bill of exceptions. But the majority of the Judges were inclined to consider, that the act of parliament did not require as a condition precedent to maintaining the action for damages for not performing a contract to purchase and accept stock, that the proprietor should, on the defendant's neglect or refusal to accept the stock, have sold it to another on or before the *next* transfer day after such default: but it merely says, that it shall be lawful for him to *sell* such stock, not saying *when*. And it was sufficient, they intimated, if the stock were sold and transferred at any time prior to the commencement of the action against the defendant who had so made default: especially where due diligence had been used by the proprietor, as the jury had found in this case. Though if the stock had risen in value in the intermediate time between the default of the defendant and the time when the stock was actually sold and transferred, so that the plaintiff might have obtained a higher price than that for which it was actually sold, but less than the price contracted for by the defendant, they thought it material for the consideration of the jury in assessing the damages; because the statute 7 *Geo.* 2. *c.* 8.

s. 6.

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BORDENAVE *against* GREGORY.

f. 6. directs, that the party injured shall recover from the person who first contracted for the purchase of the stock "all the *damage* which shall be *sustained thereby*," that is, from his default; and the *damage* to be *sustained thereby* does not necessarily mean the difference of the price on the day of the actual sale, and that for which it was contracted to be sold. For if he might have obtained more at any intermediate time, he may not be said to have *thereby sustained*, (that is, by the default of the defendant,) the damage which he incurred by waiting, but by his own default. The jury therefore were in each case to inquire whether the plaintiff might not have sold sooner than he did, and thereby saved part of the loss.

As to the first question, *Garrow* and *Gibbs*, in support of the rule, referred to the case of *Lancashire* v. *Killingworth* (*a*), where in covenant for not accepting stock of the *Hudson's Bay* Company, *at the Company's house*, on a certain notice, the plaintiff averred that he gave the notice to the other party to come to *the Hudson's Bay house* and accept the stock, and that the plaintiff *was ready there at the day*, and offered to transfer it, but that the other party did not come to accept it, nor had paid the price agreed, &c. And upon demurrer the declaration was holden ill; for where the party to whom the act is to be done does not come at the time and place appointed, the other ought to shew that he came at the last time of the day which the law has appointed for the doing of the act; and if he came there before, he ought to shew that he continued there to the last time. And that as the stock could only be transferred when the Company's house was

(*a*) 1 *Ld. Ray.* 636. *Com. Rep.* 116. 2 *Salk.* 623. 3 *Salk.* 343. and 12 *Mod.* 529.

open,

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open, which was at ſtated hours of the day, the plaintiff ſhould have averred the uſage of the Company in that reſpect, and that he came there at the proper time, and ſtaid there till after the houſe was ſhut. Here there was no ſuch averment, nor evidence of the fact.

Erſkine and *Richardſon* ſhewed cauſe againſt the rule, and endeavoured to diſtinguiſh this from the caſe cited; for there the queſtion of a legal tender aroſe upon a demurrer to the declaration, and here it ariſes after verdict (*a*), upon an averment of a tender and *refuſal*, which latter was there omitted. And here there was evidence to go to the jury that the defendant would not accept the ſtock then or at any time; for on a day ſubſequent, when there was a direct tender and refuſal, the defendant made no objection to take the ſtock on the ground that it was not properly tendered to him on the day, but aſſigned another reaſon, which ſhewed that he conſidered the contract as not binding upon him at all. And to enforce the ſtrict rule of law with reſpect to tenders on ſuch occaſions would in moſt inſtances render redreſs impracticable for breaches of contract in theſe caſes. Beſides, the caſe cited was one of a contract to be performed at a ſpecified time and place; which is not ſo here, where the contract, as alleged, was to be performed on requeſt (*b*), which muſt be underſtood of a reaſonable requeſt; and

(*a*) *Vide* the Report of the caſe cited in *Salk.* 623.

(*b*) In another caſe of the ſame kind, of *Bordenave* v. *Bartlett*, which came on upon a ſimilar rule immediately after this caſe, the evidence appearing to be, that the ſtock was contracted to be transferred *on a certain day*, and the averment in the declaration being the ſame as in this caſe, that it was to be transferred *on requeſt*, the Court ſaid, that if the objection had been taken at the trial there muſt have been a nonſuit; and on that ground the rule for a new trial was made abſolute.

here

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here there was evidence of a direct request after the 5th of *May*, and a refusal.

Lord ELLENBOROUGH C. J. The plaintiff cannot sustain the action without shewing a tender of the stock and a refusal, or that which in law is tantamount to a tender and refusal. That must be by shewing either an actual tender and refusal, which is not pretended to have been done in this case till after the 5th of *May*; or by shewing that the plaintiff staid at the Bank to the last time of that day when a tender could have been made, which was so long as the transfer books remained open, and that he was there ready to have transferred if the defendant had been there, and would have accepted the stock. From the nature of the contract, it is evident that it was meant to be performed on the day on which it was made, for the price was calculated accordingly, and the only place where the transfer could be made was at the Bank. The plaintiff therefore ought to have shewn that he had done every thing as far as in him lay towards the execution of the contract, according to the case cited, by waiting till the final close of the transfer books at the Bank on that day, which would have been a sufficient substitution of the more formal evidence of an actual tender and refusal. But here there was neither a tender in fact nor in law.

The other Judges concurred on this point.

Rule absolute.

1804.

The KING *againſt* The Inhabitants of ELTHAM.

Wedneſday, May 2d.

An order of juſtices removing *M. F. wife of P. F. a Scotchman, who never gained a ſettlement in England*" and their children to the place of *her* laſt legal ſettlement; which order was ſtated on the face of it to be made *on examination of the huſband, and with the conſent of him and his wife*; was holden good.

AN order of two juſtices for the county of *Surry* ſtated that complaint had been made to them by the church-wardens, &c. of the poor of the pariſh of *St. George the Martyr, Southwark*, in the ſaid county, " that *Mary Finn, wife of* Peter Finn, *who is a* Scotchman, *and who never gained a ſettlement in* England, with their three children, (naming the infants), &c. had lately come to inhabit in the ſaid pariſh; not having gained a legal ſettlement there, &c. (in the uſual form), and that *upon examination of* Peter Finn, and of the ſaid *Mary his wife*, on oath, &c. and upon other circumſtances, the ſaid juſtices adjudged that the pariſh of *Eltham*, in the county of *Kent*, was the laſt legal ſettlement *of the ſaid* Mary *and her three children*," and directed the removal of the ſaid *Mary* and her children accordingly to *Eltham*, " *by the mutual conſent of the ſaid* Peter *and* Mary *his wife*." Againſt this order there was an appeal, which was afterwards diſmiſſed by the Seſſions, without ſtating any caſe upon it. And both theſe orders having been removed into this Court by certiorari, objection was taken by

E. Morris, that the wife was removed by the order of the juſtices from her huſband, who was ſtill living, and probably in the very pariſh from whence ſhe and the children were removed, and whoſe aſſent to their ſeparation, even if it could be preſumed in favour of the order, was invalid. *Marſhall* v. *Rutton* (*a*). In *St. Michael* v. *Nanny* (*b*), the Court ſaid that if the huſband were in the pariſh from whence the

(*a*) 8 *Term Rep.* 545. (*b*) 1 *Stra.* 544.

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the wife was ſent, it would vitiate the order. Now that fact is to be collected in this caſe; for he is ſtated to have been examined before the magiſtrates, and to have given his conſent to the removal. [*Lawrence* J. How does it appear that the huſband was living in the pariſh of *St. George the Martyr?* He might have been before the magiſtrates without reſiding there. The order only ſtates that the wife and children were come to inhabit in that pariſh.]

Lord ELLENBOROUGH C. J. Independent of the laſt-mentioned objection, what doubt is there in the caſe? A *Scotchman*, who has no ſettlement of his own, and is deſirous to give his wife and children the benefit of hers, being unable to maintain them, conſents that ſhe ſhould be ſent to her pariſh, to which ſhe herſelf is willing to go. Why ſhould he not conſent? This is nothing like the contract of ſeparation declared to be illegal in *Marſhall* v. *Rutton*. Servants, and other perſons of that deſcription, members of the ſame family, who are to ſubſiſt by their labour, muſt frequently ſeparate for that purpoſe. Here there is neither a private nor a public injury, and there is no law againſt it.

Per Curiam, Rule diſcharged, and both Orders affirmed.

Lawes and *Wetherell* were to have argued in ſupport of the orders.

1804.

WALLACE and Another *against* SMITH, Treasurer of the WEST INDIA DOCK Company.

Thursday, May 3d.

The stat. 39 *G.* 3. c. 69. *s.* 184. directs that the *West India Dock* Company shall sue in the name of their treasurer in all actions by or on behalf of the Company, and he shall be sued for the recovery of any claim or demand upon or of any damages occasioned by the Company; and *s.* 185 after extending the protection of the stat. 24 *G.* 2. c. 44. for privileging justices of peace in actions brought against them as such, to the Lord Mayor and Aldermen of *London* acting under this act beyond the limits of the city; directs that "no action shall be commenced against *any person or persons* for *any thing* done *in pursuance or under colour of this act*, until after 14 *days' notice in* writing, or after tender of amends, &c: held that the treasurer of the Company is a person within the said clause; and being sued for an act done *by the Company* which induced an injury to the plaintiffs, was entitled to such notice before the action brought. The notice is necessary in actions for trespasses or torts; but *qu.* whether in assumpsit.

THIS was an action on the case, wherein the declaration stated that the Directors of the *West India Dock* Company had, by virtue of the statutes in that case made, provided certain navigable docks, with quays, and warehouses adjoining attached to the same, upon a certain tract of land called the *Isle of Dogs*, for the reception and discharge of ships in the *W. I.* trade. That the plaintiffs, at the times of the several grievances aftermentioned, and for ten years before, had been brokers or agents employed by divers owners or consignees of baggage, presents, and stores, arriving in ships from the *W. I.*, in taking out the necessary custom-house documents for unshipping the said baggage, &c. on paying the duties, in clearing the same at the custom-house, and landing them, and delivering them to their respective owners, for certain reasonable reward payable to the plaintiffs as such brokers. That on the 25th of *October* 1803, divers ships had arrived in the docks from the *W. I.*, with baggage, &c. on board, the owners of which had employed the plaintiffs, as such brokers, to clear, land, and deliver the said baggage, &c. to them for a reasonable reward; yet the *Company*, well knowing the premises, wrongfully and injuriously *caused to be taken and conveyed* into their warehouses the said baggage, &c. which the plaintiffs, as such brokers, were legally authorized to do; and wrongfully and injuriously, *by their ser-*

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vants, prevented the plaintiffs from entering into the said warehouses to clear away and deliver such baggage, &c. to the respective owners, by reason of which they were prevented from doing the same, and were deprived of their profits as brokers, &c. to their damage, &c. There were various other counts, alleging in substance the same grievance. Plea not guilty. At the trial before Lord *Ellenborough* C. J., at the Sittings at *Guildhall*, it appeared in evidence that an order of the Court of Directors had been made on the 25th of *October* 1803, whereby, for the complete and expeditious delivery of baggage and presents from on board ships in the docks, that Court had appointed a particular person to act as broker for the Company in the entering such articles and paying the duties thereon, to the exclusion of other brokers. That under this order the plaintiffs, who had been appointed by certain consignees as their brokers for this service, had been precluded from performing it, and thereby were deprived of their brokerage. But no notice had been previously given to the defendant before the action brought. After a verdict for the plaintiffs a rule nisi was obtained for setting it aside and having a new trial, on two grounds; 1st, on the general construction of the statutes relating to the *West India Dock* Company, vesting large discretionary powers in the Company for regulating the concerns of the docks; 2dly, on the ground of want of 14 days' notice in writing to the defendant previous to the bringing this action.

The question on the last point (the only one which was decided by the Court,) arose on the stat. 39 *Geo.* 3. *c.* 69. *s.* 184. and 185. Section 184. enacts, "that all "actions and suits commenced by or on behalf of the "Company shall be commenced and prosecuted in the "name

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" name of the treasurer for the time being of the Com-
" pany, as the nominal plaintiff for and on behalf of the
" Company; and that all actions and suits to be com-
" menced by any person or persons, &c. against the Com-
" pany, or for the recovery of any claim or demand upon
" or of any damages occasioned by the said Company,
" or for any other cause or causes of action or suit
" against the said Company, shall be commenced and pro-
" secuted against the treasurer for the time being of the
" said Company, who shall be the nominal defendant,"
&c. Section 185. enacts, " that the statute 24 *Geo.* 2.
" *c.* 44. *for rendering justices of peace more safe in the execu-*
" *tion of their office, and for indemnifying constables and others*
" *acting in obedience to their warrants*, so far as it relates
" to rendering justices of the peace more safe in the exe-
" cution of their office, shall extend to the mayor, alder-
" men, and justices respectively under the authority of
" this act. And no action or suit shall be commenced
" against *any* person or persons *for any thing done in pursu-*
" *ance or under colour of this act*, until 14 days' notice
" shall be thereof given in writing, or after sufficient
" satisfaction or tender thereof hath been made to
" the party or parties grieved, or after three calendar
" months next ensuing the time when the act or thing
" shall have been done, for which such action, &c. shall
" be so brought, &c. And the defendant in such actions,
" &c. may plead the general issue, and give this act and
" the special matter in evidence at the trial, &c., and that
" the matter or thing for which such action, &c. shall be
" so brought was done in pursuance and by the authority
" of this act. And if the said matter or thing shall ap-
" pear to have been so done; or if it shall appear that
" such action, &c. was brought before 14 days' notice

 " given

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"given as aforesaid, &c. the jury shall find for the de-"fendant," &c.

Garrow, *Park*, and *Wood* shewed cause against the rule, and contended that the 185th section only extended to acts originating in the function of magistracy, either done by justices of peace themselves, or by persons acting under their authority. The whole clause is to be construed together. The first part of it extends to the city magistrates who may have certain duties to perform pointed out by antecedent clauses in the act, and to these the protection of the general statute of the 24 *Geo.* 2. *c.* 44. is extended; which protection was necessary to be given because the statute in question enables them to act in certain cases beyond the limits of their jurisdiction, where they would not have been within the prior law. Then the subsequent part of the clause naming *person or persons* generally (which words also occur in the stat. 24 *Geo.* 2. *c.* 44. (*a*)) against whom actions may be commenced for things done *in pursuance or under colour of the act*, must be taken to mean constables and other special officers of the Company, such as harbour-masters and dock-masters, by *s.* 78. and 80. who might be called upon to execute warrants and orders issued by the justices of the peace before mentioned: and it was necessary to make a particular provision for such special officers, other than constables, who were not within the protection of the general law. If the Legislature had meant to include the directors and treasurer of the Company, which latter was liable by the

(*a*) By stat. 24 *Geo.* 2. *c.* 44. *s.* 8. "no action shall be brought against "any constable, headborough, or other officer, or against *any person or persons* "*acting by his order and in his aid*, for any thing done in obedience to any "*warrant*, &c. until demand made," &c.

ante-

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antecedent claufe to be fued for their acts, it is more natural to fuppofe that they would have exprefsly named them, and not have left their protection to be implied from any indefinite defcription, which no where elfe occurs in the act. If the claufe be not confined to acts of magiftracy, many grievances and fpoliations committed by the Company's fervants on goods in their tranfit through the docks to the *Weft Indies* muft pafs without remedy; for they could not frequently be known till after three calendar months, when the limitation of time would run upon them, and no action could be brought againft the Company or their fervants. [Lord *Ellenborough* C. J. I do not fee how acts of fpoliation can be faid to be done "in purfuance or colour of the act."] Injuries may happen by the negligence of fervants in the act of loading goods on board outward-bound fhips, which might not be difcovered till after their arrival in the *Weft-Indies*, and before notice could be fent home the time would be out for bringing an action. The mere naming of the treafurer as defendant cannot bring the cafe within the 185th claufe; for then no action even on a contract made with the Company, in which the treafurer muft be fued, could be brought without giving the notice there required, and within three months, which would be fo manifeftly abfurd and unjuft that the Legiflature could not have intended fuch a provifion.

Erfkine, *Gibbs*, and *Giles* in fupport of the rule. By making the treafurer of the Company the nominal defendant in the action, the plaintiffs admit that the act of the directors, of which they complain, (and to which perfonally the defendant as treafurer was no party) was an act done "*in purfuance*," or at leaft "*under colour of the*

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act;" for otherwise there was no authority given to sue the treasurer for the acts of the Company; and therefore the 14 days' notice ought to have been given under the 185th section. It is enough that the act complained of was done "*under colour*" of the statute; an expression which is used disjunctively with things done "*in pursuance of*" it, and was meant to include such acts as were not strictly *justified* by the statute; for there the defendant would not want *to tender amends*, which it was the object of the statute in requiring the notice to be given to enable him to do. It meant to hold out this opportunity of protecting themselves to the officers of the Company, who had bonâ fide meant to do the act complained of in their official characters under the powers of the statute, however mistaken they might turn out to be in their construction of it; to correct an error which the magnitude and complexity of the trust might subject them to. Here it was clear that the order of the directors, out of which the grievance complained of arose, was an act done in their official capacities; and the defendant being a *person* sued for a thing done *in pursuance or under colour of the act*, was therefore entitled to the notice required by *s.* 185.: for *s.* 184. makes the Company a *person*, for the purpose of suing and being sued, by substituting the treasurer in lieu of the Company as the nominal party in all actions by or against it. The 185th section contains two distinct provisions, which cannot be blended without manifest contradiction. By the first, the mayor, aldermen, and justices acting under that act are entitled to the protection of the stat. 24 *Geo.* 2. *c.* 44., which requires *one calendar month's* notice to be given to a justice of peace before any action brought against him for any thing done ex officio. And then the clause goes on to enact, that no action shall be

com-

commenced againſt *any perſon* for *any thing* done *in purſuance or under colour of the act* until *fourteen days'* notice, &c. and under the former ſtatute, the action may be brought within *ſix* calendar months after the act done; but in the latter ſtatute it is limited to *three*. But if this clauſe had been meant to be confined to conſtables and others acting under the immediate directions of the magiſtrates, it would not have limited different periods.

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Curia adv. vult.

Lord ELLENBOROUGH C. J. now delivered the opinion of the Court.

On looking at the 184th and 185th ſections of the ſtat. 39 *Geo.* 3. *c.* 69. we think that notice ought to have been given to the treaſurer of the Company, againſt whom the action is brought, who, by *ſ.* 184. is ſubſtituted in the place of the Company, for the purpoſe of ſuing in all actions inſtituted by them, or of being ſued for the recovery of any claim or demand upon or of any damages occaſioned by the Company. The firſt part of the 185th ſection extends the proviſions of the ſtat. 24 *Geo.* 2. *c.* 44. to the lord mayor, aldermen, and juſtices acting under the authority of this act. It does not merely give them, what they had before, the benefit of the ſtat. of *Geo.* 2.; but as by the act in queſtion they had duties caſt upon them to perform out of the limits of the city of *London*, it muſt be underſtood as applying to thoſe caſes: and it is to be obſerved that that proviſion does not extend to conſtables. The clauſe then proceeds to regard another claſs of perſons. "*Any perſon or perſons*" are very general and indefinite words; and the queſtion is, Whether the Company are to have the benefit of them, ſued as they are and muſt be in the perſon of their treaſurer, and not

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not in their own names. Is the treasurer a *person* within the meaning of the act? To say that he is not would be to narrow the act without any sufficient reason. He is *ens legis* for the purpose of being sued, &c. The clause does not say that "no action shall be commenced against any person or persons for any thing done *by him or them* in pursuance or under colour of the act;" for then it might be said that the grievance complained of was not done *by the defendant*, but by the Company. The question then is, Was this a thing done by any person or persons "*in pursuance or under colour of this act?*" The notice certainly applies to all actions of trespass and tort. Whether it extend to assumpsit I should doubt, according to the case of *Irving* v. *Wilson* (a); where a revenue officer having seized goods as forfeited which were not liable to seizure, and having taken money of the owner to release them, an action for money had and received was brought to recover it back again; to which objection was taken, that the officer had not had a month's notice before the bringing of the action under the stat. 23 *Geo.* 3. *c.* 70. *f.* 30. But the action was holden to be well brought notwithstanding the want of such notice. And my Brother *Grose* considered that the statute extended only to actions of trespass or tort, because the requiring of notice was to give the officer an opportunity of tendering amends; but that it did not extend to an action of assumpsit. There will be no repugnancy in the construction which we now put upon the act. For, taking the former part of the 185th clause to extend only to the lord mayor, aldermen, and justices, they will have all the privileges given them by the former statute. And *other persons* men-

(a) 4 *Term Rep.* 485.

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tioned in the subsequent part will have their privileges under this act only. It has been argued that this construction will deprive persons of their remedy whose ground of complaint is not discovered so as to be communicated to them till after three calendar months, when it will be too late to give notice. That argument certainly prevails to a considerable extent; but if the legislature have not provided for that, we cannot make a law for them, nor control a provision which in itself is clear and plain, because we cannot obviate all the difficulties which may arise out of it. If great inconvenience be likely to happen, that may form a ground of application elsewhere. Here the clause expressly directs "that no action shall be commenced against any person for any thing done in pursuance or under colour of this act, until 14 days' notice shall be thereof given." And the plaintiffs themselves have, by their own action and declaration, so far put a construction upon the thing done as having been done under colour of the act, that they have made *the treasurer* defendant in a case, where the only grievance complained of is imputed to the *company*.

Rule absolute (*a*).

(*a*) The defendant's counsel immediately agreed to wave their advantage, and refer the individual injury complained of to arbitration.

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Friday, May 4th.

POTTER and Another *againſt* BROWN.

Where the plaintiff gave the defendant, in a foreign country, where both were reſident, a bill of exchange drawn by the defendant *upon a perſon in England*, which bill was afterwards proteſted here for non-acceptance, and the defendant afterwards, while ſtill reſident abroad, became bankrupt there, and obtained a certificate of diſcharge by the law of that ſtate; held that ſuch certificate was a bar to an action here upon an implied aſſumpſit to pay the amount of the bill in conſequence of ſuch non-acceptance in *England*.

THE plaintiffs declared as payees of a bill of exchange drawn by the defendant at *Baltimore* in *America* on the 2d of *September* 1801, directed to *Anthony Mangin* of *London*, whereby the defendant requeſted *A. Mangin* ſixty days after ſight to pay to the plaintiffs or order 1200*l.* ſterling for value received, which bill was delivered by the defendant to the plaintiffs. The plaintiffs then averred that the bill was on the 23d of *December* 1801 preſented by them for acceptance to *A. Mangin*, who refuſed to accept the ſame; and thereupon they cauſed it to be proteſted for non-acceptance according to the cuſtom of merchants; by reaſon whereof the defendant became liable to pay the ſaid ſum upon requeſt, and being ſo liable he promiſed to pay it. The declaration alſo contained the common money counts: to which latter the defendant pleaded the general iſſue. And as to the firſt count he pleaded, that by a certain act of the Congreſs of the United States of *America* of the 2d of *December* 1799, intitled, *An act to eſtabliſh an uniform ſyſtem of bankruptcy throughout the United States*, it was enacted, that after the 1ſt of *June* 1800, if any merchant or other perſon reſiding within the U. S. actually uſing the trade of merchandiſe, &c. by buying and ſelling, &c. ſhould do certain acts, (enumerating them,) every ſuch perſon ſhould be deemed a bankrupt; provided the petition for the commiſſion of bankrupt ſhould be preferred within ſix months after the act of bankruptcy committed. And it was further enacted, that the judge of the diſtrict court where the debtor then reſided, or uſually reſided, at the time of

committing the act of bankruptcy, upon petition of any one or more creditors, &c. should have power to appoint commissioners of the said bankrupt, upon affidavit of the petitioning creditor's debt, and giving bond to the bankrupt conditioned to prove it, &c., which commissioners should have power after they had declared the party a bankrupt, to take into their possession all his estates real and personal, &c. in law or equity, &c. till assignees should be appointed; and should give due notice of the bankruptcy, and appoint a place for the creditors to meet and chuse assignees; at which meeting the commissioners should admit the creditors to prove their debts; and when any creditor should reside at a distance, should allow the debt of such creditor to be proved by oath or affirmation made before some competent authority and duly certified; and should admit any person duly authorised by letter of attorney from such creditor to vote in the choice of the assignees; and should assign all the bankrupt's estate and effects, with all muniments, &c. to the assignees, &c. It then contained provisions for the surrender and examination of the bankrupt, who was required to execute in due form such assignment of his estate and effects as should be directed by the commissioners, to vest the same in the assignees, their heirs, executors, &c. in trust for the use of all and every the creditors who should prove their debts, &c. That in case any such bankrupt should afterwards be arrested or impleaded for or on account of any of the said debts, he might appear without bail, and plead the general issue, and give that act and the special matter in evidence: and the certificate of such bankrupt conforming, and the allowance thereof according to the directions of that act, should be allowed to be sufficient evidence primâ facie of the party's being a bankrupt within

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within the meaning of that act, and of the commission, &c., and a verdict should thereupon pass for the defendant, unless the plaintiff should prove that the certificate was obtained unfairly and by fraud. It then set forth various regulations against fraud, and enacted that *every such bankrupt should be discharged from all debts by him due or owing at the time he became bankrupt, and all which were or might have been proved under the said commission.* And it was further enacted, that every person who should have bonâ fide given credit to or taken securities payable at future days from persons who were or should become bankrupts, not due at the time of such persons becoming bankrupts, should be admitted to prove their debts and contracts as if they were payable presently. The defendant then averred, that on the 22d of *February* 1802, while that act was in force, he was a merchant residing at *Baltimore* within the United States of *America*, and actually using there the trade of merchandise by buying and selling, and that he so residing and exercising trade, &c. became indebted to one *W. E.* in 1000 dollars, &c.; and that after the cause of action in the 1st count mentioned accrued to the plaintiffs (the said debt to *W. E.* being then due), the defendant became a bankrupt within the meaning of the said act. And so the plea proceeded to state the issuing of the commission of bankrupt against him on the petition of *W. E.*, in the manner prescribed by the act; that the commissioners possessed themselves of all the defendant's estate and effects, and issued the notice required to the bankrupt to surrender himself, and to the creditors to come in and prove their debts; that the defendant did surrender and conform himself to the act; that he was declared a bankrupt after the 1st of *June* 1800, and before the suing out of the commission; that the

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the creditors were by due notice required to prove their debts, and to assent or dissent from his certificate; that his certificate was afterwards signed by full two-thirds of the creditors in number and value, for the purpose of his being discharged from his debts, in pursuance of the act; and that that certificate was duly allowed by the judge of the district. The defendant then averred, that after the making of the contract after mentioned, in pursuance of which the bill of exchange in the first count mentioned was drawn, and also before, at, and after the time of the defendant's drawing that bill and receiving the considera-tion after mentioned for the same, the plaintiffs were merchants carrying on trade in copartnership *as well in the United States of* America, to wit, at *Baltimore* aforesaid as in *England*, and *having a house of trade in the U. S.*, to wit, at *Baltimore* aforesaid, *where one of the plaintiffs* (W. Page) *then resided*; and they so carrying on trade, and having a house of trade in the U. S., and one of them so residing there as aforesaid, they, *before the defendant became a bankrupt*, viz. on 2d *September* 1801, *at* Baltimore *in the said U. S. contracted with the defendant* to purchase of him such bill of exchange as in that count is mentioned, and then and there delivered to him in payment, and as a consideration for the same, divers promissory notes then and there in the said U. S. made by one *R. D.*: and thereupon, before the defendant became a bankrupt, viz. on 2d *September* 1801, at *Baltimore* in the said U. S., in pursuance of the last mentioned contract, and in consideration of the aforesaid promissory notes so to him delivered as aforesaid, the defendant made and drew the said bill of exchange in the first count mentioned, and delivered the same to the plaintiffs; and *that the said debt by the first count attempted to be recovered did not, nor did any part thereof*

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accrue in this realm or elsewhere than in the said U. S. in any other or different manner than this, that the said bill of exchange being drawn in the U. S. as aforesaid, *was drawn upon a person in this realm, and was presented for acceptance in this realm, and was refused acceptance in this realm*, viz. at *London*, &c. And the defendant further averred, that the said bill was presented for and refused acceptance, as in the said count mentioned, and the said sum in the said bill mentioned became and was due and owing as aforesaid before the date or suing forth of the commission against the defendant, and before he became bankrupt as aforesaid; and that after the same sum so became due, and after the date and suing forth of the commission, and while the same was in prosecution, and before the commencement of this action, viz. on 3d of *March* 1801, *at* Baltimore *in the said U. S., the plaintiffs proved under the said commission as creditors of the defendant, taking the benefit of the said commission, the contents of the said bill of exchange*, as a debt to them, and then due and owing from the defendant, they then and there being as such creditors entitled to prove the same as aforesaid, and to take the benefit of the said commission as aforesaid, to wit, at, &c. concluding with a verification. To this there was a general demurrer, and joinder.

T. Carr in support of the demurrer. A certificate obtained by a bankrupt abroad under a commission issued by authority of the law of that country cannot be pleaded in bar to an action here for a cause of action arising in this country: for the law of a foreign state cannot bind the subjects of this country, nor abrogate a contract arising here. If indeed the cause of action must be taken to have arisen in *America*, where the defendant obtained his

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certificate, the case cannot be distinguished from *Ballantine* v. *Golding* (a), the doctrine of which has been lately recognized in *Smith* v. *Buchanan* (b): but if it arose here the last mentioned case is an authority in point that the foreign certificate is no bar; and the same principle is established by the case of *Folliott* v. *Ogden* (c). Now, 1st, The immediate cause of action arose in this country; for the cause of action is the assumpsit raised by law upon the legal liability of the defendant to pay the amount of the bill drawn by him, in consequence of the dishonour of the bill, which was in *England*. This is a right of action collateral to the bill itself, and did not exist in *America* before the non-acceptance of the bill, but arose on the dishonour of the bill; for which the drawer is suable immediately, without waiting for the time the bill had to run. *Bright* v. *Purrier* (d), *Milford* v. *Mayor* (e), and *Ballingalls* v. *Gloster* (f). 2dly, This, being a simple contract debt, follows the person of the creditor and not of the debtor. But, 3dly, Supposing the right of action to be founded on the bill, yet that being a negotiable instrument in its nature, and as it were a visible chose in action, and being addressed for acceptance to a person in *England*, it may be said to have transferred the original debt in a peculiar manner from *America* to *England*, as if the contract had been originally made here: it was a contract by the drawer to pay the holder a sum of money in this country. Then the promise and the breach of it may both be said to have happened here, and out of the jurisdiction of the U. S. In *Burrows* v. *Jemino* (g) the acceptance (on which the plaintiff was sued here) was at *Leghorn*, in which country

(a) *Co. Bankt. L.* 515. (b) 1 *East*, 6. (c) 1 *H. Blac.* 123.
(d) *London* Sittings after *Trin.* Term, 1765. *Bull. N. P.* 269.
(e) *Doug.* 54. (f) 3 *East*, 481. (g) 2 *Stra.* 733.

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he had obtained his difcharge: and in *Ballantine* v. *Golding* (*a*) the bill was drawn in *Ireland*, and payable by the defendant who refided there, where the difcharge was. But in *Robinfon* v. *Bland* (*b*), where a bill of exchange was drawn by Sir *J. Bland* at *Paris* upon *himfelf in England* (which bill being drawn for money won at play was on that ground holden to be void); Lord *Mansfield* faid, "the law of the place can never be the rule where the tranfaction is entered into with an exprefs view to the law of another country. Here *the payment* is to be made *in* England; it is an *Englifh fecurity*, and fo intended by the parties." And the other Judges fpoke to the fame effect. The fame rule will apply to this cafe: the plaintiff looked to *Englifh* fecurity, and required his debt to be made payable here. (The Court having expreffed a clear opinion againft him on this point, the other points were not urged.)

Jervis contrà was ftopped by the Court.

Lord ELLENBOROUGH C. J. The rule was well laid down by Lord *Mansfield* in *Ballantine* v. *Golding*, that what is a difcharge of a debt in the country where it was contracted, is a difcharge of it every where. And that principle was recognized in *Hunter* v. *Potts* (*c*). Now this debt arofe out of a contract in *America*. The debt was incurred there for which the bill was given. The bill was drawn in *America* upon a perfon in *England*: but not having been accepted, the parties ftood on their original rights, upon a contract made in *America*, for which a fecurity was *there* agreed to be taken, upon the faith indeed that it would be accepted and paid in *England*; but of which there has been no performance: no *Englifh act* has been done to alter the

(*a*) *M.* 24 *Geo.* 3. *B. R.* *Co. Bankt. L.* 347. 1ft edit.

(*b*) 2 *Burr.* 1077.

(*c*) 4 *Term. R. p.* 182.

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ſituation of the parties: even the notice of the non-performance, which is one of the circumſtances on which the implied aſſumpſit is founded, muſt have been given in *America*, where the parties are ſtated to have reſided when the bill was given, and when the bankruptcy happened, and nothing appearing to ſhew that they ever changed their reſidence. Then if the bankruptcy and certificate would have been a diſcharge of the debt in *America*, which it clearly would, it muſt, by the comity of the law of nations, recognized in the caſes I have mentioned, be the ſame here. It is in every day's experience to recognize the laws of foreign countries as binding on perſonal property; as in the ſale of ſhips condemned as prize by the ſentences of foreign Courts; the ſucceſſion to perſonal property by will or inteſtacy of the ſubjects of foreign countries. We always import together with their perſons the exiſting relations of foreigners as between themſelves, according to the laws of their reſpective countries; except indeed where thoſe laws claſh with the rights of our own ſubjects here, and one or other of the laws muſt neceſſarily give way, in which caſe our own is entitled to the preference. This having been long ſettled in principle, and laid up amongſt our acknowledged rules of juriſprudence, it is needleſs to diſcuſs it any further.

LAWRENCE J. The queſtion is, Whether the facts on which the plaintiff raiſes the implied promiſe did not occur in *America?* Now when the plaintiff agreed to take the bill in queſtion, drawn by the defendant in *America* upon a perſon in *England*, the promiſe was in effect this, to pay the money in *America* if it were not paid here. Then the bill having been refuſed acceptance here, the implied promiſe to pay the money aroſe in *America*, and conſe-

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The other Judges concurring,

Judgment for the Defendant.

Friday, May 4th.

DOE, on the Demise of JANE SHEWEN, Widow, *against* WROOT and Others.

Till admittance of the surrenderee of a copyhold upon mortgage the surrenderor continues the legal tenant, and he cannot devise the equity of redemption even after the surrender made without a new surrender to the use of his will; but the legal estate, which on his death descends to his heir at law, will carry the equity of redemption also to the heir in respect to the mortgagee.

IN ejectment for a moiety of several copyhold estates in *Sutton St. Mary*, *Sutton St. Nicholas*, and *Sutton St. James*, copyhold of the manor of *Sutton Holland*, and in *Gedney*, copyhold of the manor of *Gedney Pawlett*, all in the county of *Lincoln*, a verdict was found for the plaintiff at *Lincoln Lent* assizes 1803, before *Graham* B., subject to the opinion of this Court on the following case.

At a general court baron, holden for the manor of *Sutton Holland*, on the 22d of *May* 1766, *Anthony Jones* Esq. was admitted as only brother and heir of *Richard Jones* Esq. deceased, tenant to five messuages and 101 A. 3 R. 9 P. of land, lying in the three *Suttons*, holden of the said manor by copy of court roll, to hold to the said *A. Jones*, his heirs and assigns, for ever, according to the custom of the said manor. At a special court baron holden for the said manor on the 10th of *February* 1767, *A. Jones* duly surrendered the said messuages and lands to the use of *T. Alderson* Esq., his heirs and assigns, conditioned to be void on repayment of the principal mortgage sum of 1000*l.*, with interest, on the 16th of *June* then next. Afterwards, at the same court, *A. Jones* surrendered the said messuages, lands, &c. to the use of his will. *T. Alderson* was never admitted on the above con-

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ditional surrender; but *A. Jones* continued in possession of the said estates and receipt of the rents and profits until his death, and died intestate, leaving *Jane Jones* his sister and heir, who was, at a court holden for the manor on the 4th of *October* 1770, duly admitted to the said estates, to hold to her and her heirs, &c. On the 2d of *October* 1770, *T. Alderson* duly acknowledged satisfaction on the above conditional surrender, which acknowledgment was enrolled at the said court on the 23d of *May* 1771. On the 10th of *October* 1770, *Jane Jones* duly surrendered all her said messuages, lands, &c. to the use of *J. F.*, *S. B.*, and *R. F.*, executors of *W. Langley*, and their heirs, &c. upon condition to be void on repayment to them of 4000*l.*, with interest, on the 10th of *April* following; which surrender was duly presented on the 23d of *May* 1771; and at a court baron, holden on the 23d of *May* 1771, *Jane Jones* surrendered all her said messuages, lands, &c. to the use of her will. *Langley*'s executors were never admitted on the above conditional surrender; but *Jane Jones* continued in possession of the said estates and receipt of the rents and profits until her death, and she died intestate, leaving *Gryffyd Price* Esq. her heir; who, at a court holden on the 31st of *May* 1787, was accordingly admitted tenant, to hold to him, his heirs, &c. *Gryffyd Price*, by a codicil to his will duly executed, and dated the 17th of *April* 1787, charged the above copyholds with an annuity of 200*l.* to his wife for life, and, subject thereto, he devised all the said real estates so descended, and the trust and equity of redemption of such parts thereof as were then in mortgage, or wherein he stood seised of an equitable estate only, of what tenure or nature soever the same might consist, unto his cousin *John Llewellyn* in fee: and afterwards died, leaving the

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said *John Llewellyn* and *Jane Shewen*, the lessor of the plaintiff, his cousins and heirs at law. At a manor court holden on the 27th of *June* 1788, *John Llewellyn* was admitted under the said codicil of *Gryffyd Price* to the above messuages and lands, to hold to him, his heirs and assigns. At a manor court holden on the 19th of *May* 1796 was enrolled an acknowledgment of satisfaction, dated the 9th of *April* 1796, from *R. F.* the surviving executor of *W. Langley*, and from *W. Langley* his son and residuary legatee, on the above surrender, made the 10th of *October* 1770. In the 28th *Geo.* 3. an act passed for dividing and enclosing the commons of *Long Sutton*, comprising the three *Suttons*; and the commissioners, by their award, dated 9th of *January* 1790, allotted to *John Llewellyn*, in respect to the above five copyhold messuages and in lieu of the rights of common, 78 A. 3 R. 19 P. of land in *Sutton St. Mary*. The act contains the usual clause that the commissioners are not to determine on titles. At a general court baron, holden for the manor of *Gedney Pawlett*, on the 1st of *October* 1739, *Jane*, the wife of the Rev. *A. Jones*, clerk, was admitted as daughter and heir of *Jane Griffith*, widow, deceased, to 10 acres of land in *Gedney*, to hold to her, her heirs, &c. And at the same court was presented a surrender made by *A. Jones* and *Jane* his wife, on the 27th of *July* then last, of the said 10 acres in *Gedney*, to the use of them for their lives and the life of the survivor; remainder to the heirs of their two bodies, remainder to the right heirs of *A. Jones*. And *A. Jones* and *Jane* his wife were thereupon admitted tenants on the above surrender to the said land. On their deaths the land descended to *Richard Jones*, their eldest son; and on his death, without issue, to his only brother *Anthony Jones*; and on his death, without issue, to his only

sister

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sister *Jane Jones*; and on her death, without issue, to *Gryffyd Price* Esq. her heir at law. But neither *Richard*, *Anthony*, or *Jane Jones*, or *Gryffyd Price*, were ever admitted thereto. By an indenture, dated 10th of *October* 1770, between the abovenamed *T. Alderson* of the first part, the said *Jane Jones* spinster, of the second part, and *J. F.*, *S. B.*, and *R. F.*, (executors of *W. Langley*) of the third part; reciting the mortgage for 1000*l.* from *A. Jones* to *T. Alderson*, dated 15th and 16th of *January* 1767, of the freehold estates of *A. Jones* in *Sutton St. Mary*, *Sutton*, and *Gedney* aforesaid, and which indenture of the 10th of *October* 1770 was an assignment and confirmation of the said mortgage, and made for securing 4000*l.* and interest to *J. F.*, *S. B.*, and *R. F.*, and wherein is a covenant from *Jane Jones*, that for the better securing the payment of the said 4000*l.* and interest, she would immediately surrender all the copyhold premises before mentioned to the use of *J. F.* &c., their heirs and assigns, redeemable on repayment of the 4000*l.* and interest; but no surrender was made by *Jane Jones* in pursuance of this covenant. At a court holden for the manor of *Gedney Pawlett*, on the 31st of *March* 1796, *John Llewellyn* was admitted under the said codicil of *Gryffyd Price* to the said 10 acres of land in *Gedney*, to hold to him in fee: and on the 30th of *April* 1796, in consideration, &c. he surrendered all the said copyhold messuages and lands in *Long Sutton*, &c. as well the old estates as the new allotments, and also the said land in *Gedney*, in different parcels, to the present defendants, who have been duly admitted thereto, and are now in possession thereof. The question for the opinion of the Court was, Whether the lessor of the plaintiff were entitled to recover one moiety of the copyhold estates in *Long Sutton*, otherwise

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Sutton St. Mary, *Sutton St. Nicholas*, *Sutton St. James*, and *Gedney*, or either of them, as one of the heirs at law of *Gryffyd Price*, the fame not having been furrendered by the faid *Gryffyd Price* to the ufe of his will? or, Whether the faid *Gryffyd Price*'s intereft therein was not an equitable eftate only, and as fuch paffed by his will without fuch furrender?

Balguy, for the leffor of the plaintiff, contended that *Gryffyd Price* had a legal and not an equitable eftate only in the copyholds in queftion; and he not having furrendered to the ufe of his will, the eftates could not pafs to his devifee. Where one is in legal feifin as tenant of copyhold lands, and, by what is called a will, appoints thofe lands to the ufe of another, he muft furrender to the ufe of his will. In *Coke's Copyh. f.* 39. it is faid, "a furrender (where by a fubfequent admittance the grant is to receive its perfection and confirmation) is rather a manifefting of the grantor's intention than of paffing away any intereft in the poffeffion; for till admittance the lord taketh notice of the grantor as his tenant, and he fhall receive the profits of the land to his own ufe, and fhall difcharge all fervices due to the lord;" but "he cannot pafs away the land to any other, or fubject it to any other incumbrance than it was fubject to at the time of the furrender. Neither in the grantee is any manner of intereft invefted before admittance; for if he enter he is a trefpaffer, &c. And if he furrender to the ufe of another, this furrender is merely void, and by no matter ex poft facto can be confirmed." And he alfo referred to *Perry* v. *Whitehead* (a), *Kenebel* v. *Scrafton* (b), and to the following

(a) 6 *Vef. jun.* 544. (b) 8 *Vef. jun.* 30.

ing MS. case: "*Floyd* v. *Aldridge and Willis*, 20th *Nov.* 1777. In 1772, the testator mortgaged the copyhold in fee, and surrendered to the mortgagee, but the latter was not admitted. The money was not paid at the time. The testator made his will in 1774, and devised the estate, without a surrender, to the use of his will; and died in 1775. The devisee brought this bill to redeem, making the heir a party. Sir *T. Sewell*, Master of the Rolls, dismissed the bill, saying, that the plaintiff had no interest in the copyhold in practice or otherwise. If the mortgagee have not the legal estate, there is no equity of redemption. The legal estate remains in the surrenderor till admittance of the surrenderee. After the first surrender, before admittance, he is tenant to the lord, and may therefore surrender to the use of his will. A second cannot prejudice a first surrender. When the first surrenderee comes in he will be admitted. A mortgagee is seldom admitted: the mortgage is discharged by an entry on the court rolls. All remains in the mortgagor; no fine, no change of tenant, &c. As he might have made a surrender to the use of his will without prejudice to the mortgagee, he ought to have done it; and the estate cannot pass at law; and equity will not assist a volunteer against the heir."

The Court asked the defendant's counsel where the difficulty was? For till admittance the legal estate continues in the surrenderor, and descends to his heir, if it be not devised, and a surrender made to the use of the will.

Reader, contrà, admitted that till admittance of the surrenderee the legal estate remains in the surrenderor, so as to subject him to all the services due to the lord: but he meant to have argued, that he had not any beneficial

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alienable estate in him after the surrender, and could not make any new disposition of the land without satisfaction of the surrender being first entered on the court roll of the manor; and the admittance of the surrenderee at any time afterwards would certainly relate back to the time of the surrender. Therefore as to all but the lord the surrenderor seems to have only such equitable right as he had reserved to himself by the terms of the surrender; and therefore the equity of redemption might pass by the will, without a surrender to the use of it; which surrender, pending the former unsatisfied surrender, seems to be useless. Or taking him to have the legal estate, yet holding it merely as a trustee, it would descend to his heir as a bare trust which could not be set up against the cestuy que trust, who claimed under the will. He admitted, however, the application of the cases of *Kenebel* v. *Scrafton*, and *Floyd* v. *Aldridge*, against his argument.

Lord Ellenborough C. J. We can only look to the legal estate, and that is clearly not in the devisees, but in the heir at law of the surrenderor; and if the devisees have an equitable interest, they must claim it elsewhere, and not in a court of law. For as to the doctrine that the legal estate cannot be set up at law by a trustee against his cestuy que trust, that has been long repudiated, ever since a case which was argued in the Exchequer Chamber some years ago (*a*).

Per Curiam, Postea to the Plaintiff (*b*).

(*a*) I presume the case alluded to by his Lordship was *Weakley on the demise of Yea, Bart.* v. *Rogers*, where Sir *William Yea* had agreed about seven years before with the defendant to grant him, in consideration of a certain sum which was paid, a lease for his own and his son's life; and the defendant, on the faith of that agreement, had entered into possession and built a house on the premises. After which Sir *Wm.* (not having executed any lease) gave the defendant

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defendant six months' notice to quit, considering him as tenant from year to year, and brought this ejectment. The case was argued in this Court in *Trinity* Term 29 *Geo.* 3., when the Court, after taking time to consider, and (as it was understood) not being agreed in opinion, directed the case to be argued before all the Judges in the Exchequer-chamber, which argument took place in *Michaelmas* Term 30 *Geo.* 3., when a second argument was awarded; but the case was never brought before the Judges again. [Vide 7 *Term Rep.* 51.] But, as I collected at the time, Lord *Loughborough* C. J. *Gould*, *Ashhurst*, and *Buller* Js., were of opinion that the defendant's equitable title might be set up as a defence to the ejectment. Lord *Kenyon* C. J. *Eyre* C. B. and *Heath* J. were decidedly of a different opinion: and with these it is probable that the other Judges coincided; though I have no authority for saying so; and no public opinion was ultimately delivered on the case. But that an equitable title cannot be set up in ejectment has ever since been considered as settled. Vide *Doe* v. *Sybourn*, 7 *Term Rep.* 2., *Goodtitle* v. *Jones*, in Error, *ib.* 47., *Doe* v. *Wharton*, 8 *Term Rep* 2., and *Roe* v *Reade*, *ib.* 122, 3. See also, on the same subject, *Doe* v. *Pegge*, 1 *Term Rep.* 758., *Doe* v. *Staple*, 2 *Term Rep.* 684, and *Roe* v. *Lowe*, 1 *H. Blac.* 446.

(*h*) But where the mortgagee is admitted, the equity of redemption may be devised by the mortgagor, without having surrendered to the use of his Will. *King* v. *King*, 3 *P. Wms.* 358.

BONNER *against* CHARLTON.

Friday, *May* 4th.

Where a verdict is taken for a certain sum, subject to the award of an arbitrator, to whom all matters in difference are referred by a rule of Nisi Prius, he cannot award a *greater* sum than that for which the verdict was taken, and if he do, no assumpsit by implication will arise to pay even to the extent of the verdict so taken.

IN assumpsit, the declaration stated, that on the 14th of *August* 1782 certain differences were depending between the plaintiff and defendant, and that at the assizes at *Newcastle* a cause between them was to have been then tried, but by an order of Nisi Prius it was ordered by the consent of the parties that there should be a verdict for the plaintiff for 30*l.* damages and 40*s.* costs, subject to the award of *J. A.*, *J. H.*, and *W. T.*, to whom all matters in difference between the parties were referred, so that they should make their award in writing on or before the 10th of *November* then next, and that the costs of the cause should abide the event of the award, &c., and that

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that that order ſhould be made a rule of Court. It then ſtated the mutual promiſes to perform the award, and then averred an award made by the arbitrators named on the 6th of *November*, adjudging that there was due from the defendant to the plaintiff 70*l.* which they directed to be paid on the 1ſt of *January* 1803, and that the coſts of the arbitration ſhould be equally borne, and that the defendant ſhould pay to the plaintiff the further ſum of 5*l.* 5*s.* a moiety of ſuch coſts, and that the plaintiff ſhould thereupon diſcharge the coſts of the arbitration: of which the defendant had notice. That the order of Niſi Prius was afterwards made a rule of Court, and the coſts were taxed at 73*l.* *By reaſon of all which premiſes* the defendant became liable to pay to the plaintiff the ſaid ſums of 70*l.* and 73*l.*, *according to the form and effect of the award, and the ſubmiſſion, promiſe, and undertaking of the defendant;* and then ſtated the breach in nonpayment of thoſe ſums. There were alſo the common counts for money paid, &c. The defendant paid into court the 5*l.* 5*s.*, the moiety of the coſts of the award, and to the reſt pleaded non aſſumpſit. And at the trial at the laſt ſummer aſſizes at *Newcaſtle*, before *Thomſon* B., a verdict was found for the plaintiff for 143*l.*, made up of the ſum of 70*l.* awarded to be paid, and the ſum of 73*l.*, the taxed coſts mentioned in the pleadings of this cauſe, ſubject to the opinion of the Court on the following caſe.

The order of Niſi Prius mentioned in the pleadings was as follows: "it is ordered by the conſent of the ſaid "parties and their attornies, that there be a verdict in this "cauſe for the plaintiff 30*l.* damages, and 40*s.* coſts, ſub-"ject to the award and determination of *J. A.*, *J. H.*, "and *W. T.*, to whom all matters in difference between "the parties are referred, ſo that they or any two of them

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" make and publish their award in writing on or before " the 10th of *November* next, and that the costs of the " cause shall abide the event of the award, and the costs " of the arbitration be in the discretion of the arbitrators, " who may direct by, and to whom, and in what manner " the same shall be paid; and that a verdict shall be en- " tered for such sum only (if any thing) as the said arbi- " trators, or any two of them, shall find to be due from " the defendant to the plaintiff." And if nothing be due, then that a verdict should be entered for the defendant, &c. Proceeding in the common form, and concluding that the order should be made a rule of Court, &c. The arbitrators afterwards made their award on on the 6th of *November* 1802, within the time limited; in which, after reciting the order of Nisi Prius, and considering the proofs, they adjudged that there was due from the defendant to the plaintiff 70*l.*, and awarded the defendant to pay the same to the plaintiff on the 1st of *January* then next, &c. at a certain place named; and further that the costs of the arbitration should be borne by the parties equally, and that the defendant should pay the plaintiff the further sum of 5*l.* 5*s.*, being a moiety of such costs, and thereupon the plaintiff should pay all the costs of the arbitration; and that on payment of that sum, together with the said sum of 70*l.* and the costs, the parties should execute mutual releases. The costs of the cause were afterwards taxed by the Master of this court in the sum of 73*l.* The defendant, on the 6th of *November*, had notice of the award, and the plaintiff attended at the time and place appointed for the purpose of receiving the damages and costs awarded to him; but the defendant never paid or tendered the damages or costs, except the said sum of 5*l.* 5*s.* paid into court as aforesaid. The

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plaintiff's counſel inſiſted at the trial that the ſaid payment into court by the defendant of the five guineas admitted the order of Niſi Prius and award to be the ſame as ſet forth in the declaration. On the 12th of *February* 1803 payment of the ſums of 70*l.* and 73*l.*, mentioned in the award and the Maſter's allocatur, was demanded of the defendant, which he did not pay; and the plaintiff diſcharged the whole coſts of the arbitration, being ten guineas. There was no proof of any promiſe otherwiſe than as aforeſaid. The queſtion for the opinion of the Court was, Whether the plaintiff were entitled to recover any and what ſum?

Richardſon was to have argued for the plaintiff, and *T. Carr* for the defendant. But on the opening of the caſe,

The Court expreſſed a decided opinion that the arbritrator had no authority to award greater damages than what the verdict of the jury had been taken for at the trial. The only power given to an arbitrator in ſuch caſe being to reduce, but not to enhance the damages. And in anſwer to an obſervation by the plaintiff's counſel, that at leaſt the plaintiff might take his judgment for the 30*l.* given by the jury, inaſmuch as the award was good up to that extent, though bad for the exceſs; *the Court* ſaid that could not be done in a caſe where the award was of of an entire ſum, though it might when diſtinct things were awarded, ſome of which were good and others not. That if damages were laid in the declaration at 100*l.*, and the jury gave 200*l.*, it would be error on the record, and a court of error could not cut down the verdict to 100*l.*

The hardſhip of the caſe being further preſſed, the Judges gave their opinions ſeriatim.

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Lord ELLENBOROUGH C. J. The verdict was taken at the trial for 30*l.*, subject to the award of an arbitrator: he had therefore a limited jurisdiction, *within that amount*, to assess the damages which, upon investigation, he should find that the plaintiff had sustained; but he had no authority to *exceed* that amount. The damages found by the jury may in this respect be compared to the damages laid in the declaration; they operated as a limit to the discretion of the arbitrator, in like manner as the jury are limited by those laid in the declaration. If the jury find more than are laid, and the plaintiff do not remit the excess upon the record, the Court have no authority to do so, and the verdict will be erroneous. Here we have nothing to guide our discretion in cutting down the sum awarded. If we could ask the arbitrator whether the sum of 30*l.* were right, he might very consistently answer in the negative, and tell us that either the 70*l.* was in fact due, or none, or less than 30*l.* That would depend on his judgment on the several items of the account. Therefore all that we can see is, that the arbitrator has formed a wrong judgment: we have no means of correcting it: we may quash his award altogether, but we cannot mend it. If instead of bringing on the question in this shape the facts had been laid before the Court by affidavit in a summary way, we might have formed our judgment upon the matter and aided the plaintiff as far we were warranted in doing: but I understand an attempt of this sort has already been made without success.

GROSE J. I remember the application made some terms ago in this matter. The object there was to enter judgment for the 70*l.*, which we thought we had no authority

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to direct when the jury had only given 30*l.* The plaintiff then was not satisfied with 30*l.*

Lawrence J. If the arbitrator had awarded two distinct sums of 30*l.*, we might have allowed the plaintiff to take judgment for the one sum which was legal, and not for the other which exceeded his authority. But we cannot tell whether the arbitrator did not take into his consideration matters which were not submitted to him; and that if he had not so done, whether he would not have reduced the damages even below 30*l.* How then can we say that the plaintiff should have judgment for 30*l.* without knowing on what ground the excess was given? What the Court refused on the former application was to give the plaintiff the whole sum awarded. If it had been shewn that the arbitrator at all events thought the plaintiff entitled to the 30*l.* we might have granted the application to that extent.

Le Blanc J. This action is founded upon an implied assumpsit for 70*l.* and the costs. Now I cannot think that under the rule of reference, the verdict having been taken for 30*l.* only, that the law will raise an implied assumpsit to pay as much more as the arbitrator shall think proper to award. The true meaning of the rule of reference is, that the parties consent that the arbitrator shall mould *the verdict* which has been taken, and that the verdict so moulded by him shall be taken to be the verdict which the jury should have found. For this purpose the verdict is always taken at the highest sum for which it is supposed that the damages can in any event be awarded, generally indeed for the amount of the damages

mages laid in the declaration; but it never is underſtood by the parties to ſuch conſent rule that the arbitrator is at liberty to award damages to any extent he pleaſes. The law therefore will not raiſe an aſſumpſit to pay any larger ſum than what the arbitrator had authority to award; and he having awarded one entire ſum, beyond his authority, no aſſumpſit can be raiſed to pay that or any ſmaller ſum.

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Lord ELLENBOROUGH C. J. declared his further concurrence on the laſt mentioned ground.

Poſtea to the Defendant.

SOMERVILLE *againſt* WHITE.

Monday, May 7th.

The Court will not infer that a writ of error was ſued out for delay becauſe it was ſued out before final judgment ſigned: and though it ſhould be made returnable before final judgment, it will ſtill operate as a ſuperſedeas upon the judgment, which, when ſigned in the ſame term, relates back to the firſt day of it: and therefore execution iſſued thereon after ſuch writ of error allowed and ſerved was ſet aſide for irregularity.

A Rule niſi was obtained for ſetting aſide the execution, and returning the money which had been levied under it, for irregularity; the execution having been ſued out pending a writ of error and after notice of the allowance. After a ſham plea and iſſue joined, and interlocutory judgment and a writ of inquiry executed, the defendant, four days before final judgment entered up, ſued out a writ of error on the 9th of *February*, returnable on the 11th, and ſerved notice of the allowance: the plaintiff, notwithſtanding, after entering up final judgment on the 15th, ſued out execution thereon.

Garrow ſhewed cauſe, inſiſting that it appeared upon the very face of the proceedings that the writ of error was ſued merely for delay; it having iſſued four days before final judgment entered. That this was a more convincing proof of it than an unguarded acknowledgment of the party himſelf in converſation, which was admit-

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ted to be a ſufficient reaſon for ſuing out execution pending a writ of error.

Gibbs and *Comyn*, contrà, cited *Jaques* v. *Nixon* (*a*), where final judgment was not ſigned till after the writ of error ſued out and the allowance of it ſerved; and there *Buller* J. recognized the practice of ſuing out a writ of error before judgment ſigned; which he ſaid happened in almoſt all caſes; for otherwiſe execution would iſſue inſtantly. And that if a writ of error be ſued out, and the plaintiff will not ſign judgment till after the return of the writ, in order to avoid the effect of it, and then ſue out execution, the Court would ſet that execution aſide: and ſo it was done in that caſe.

The Court referred to *Warwick* v. *Figg* (*b*), where, under ſimilar circumſtances, it was contended that the writ of error, which was returnable before final judgment, was ſpent when the judgment was entered up and execution iſſued, and therefore was no ſuperſedeas to the execution. But it was ruled otherwiſe; becauſe the judgment, when entered, related back to the firſt day of the term, and therefore the writ of error was a ſuperſedeas to it: and the Court therefore ſet aſide the execution. And they added that they could not infer that any delay was intended merely from a view of the proceedings, without an acknowledgment by the party that the writ of error was ſued out merely for delay. That the precaution of ſuing out the writ of error before final judgment ſigned was ſometimes neceſſary: For where the judgment was for a large ſum, a plaintiff would ſometimes ſue out execution immediately afterwards without waiting to have his coſts taxed,

(*a*) 1 *Term Rep.* 279. (*b*) Qto. *Barnes*, 196.

and

and before a writ of error could be sued out to stay him, if it were not sued out before.

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SOMERVILLE against WHITE.

Rule absolute.

NADIN *against* BATTIE and WARDLE.

Monday, May 7th.

If one of two defendants taken on a joint ca. sa. be discharged under an insolvent debtors' act, that will not operate as a discharge of the other, the discharge of the former not being with the actual consent of the plaintiff.

THE defendants were arrested on a joint ca. sa.; after which *Wardle* was discharged under an insolvent debtors' act, the plaintiff not opposing such discharge. Whereupon

Littledale now moved to discharge the other defendant *Battie*, and cited *Clark* v. *Clement* and *English* (a), and other cases there referred to, to shew that if a plaintiff consent to discharge one of several defendants taken on a joint ca. sa., he cannot afterwards take any of the others. And though, he observed, the discharge in this case might be said to be by the act of the law, and not, as in that case, by the plaintiff's own act; yet the plaintiff so far adopted it, that if he had chosen to pay the sixpences he might have prevented the discharge.

Lord ELLENBOROUGH C. J. The discharge cannot be said to have been with the plaintiff's assent, because he did not choose to detain the party in prison at his own expence. Nor can the law, which works detriment to no man, in consequence of having directed the discharge of one defendant, so far implicate the plaintiff's consent, against the fact, as to operate as a discharge of the other.

Per Curiam, Rule refused.

(a) 6 *Term Rep.* 525.

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Tuesday, May 8th.

APPLETON *against* BINKS.

One who covenants *for himself, his heirs*, &c. and under his *own hand and seal*, for the act of another, shall be personally bound by his covenant, though he describe himself in the deed as covenanting *for and on the part and behalf* of such other person.

THE plaintiff declared in covenant upon articles of agreement between him on the one part, and the defendant *by the name and description of* T. Binks, *of*, &c. (*for and on the part and behalf of the Right Hon. Lord Viscount* Rokeby) of the other part, with a profert in curiam of the articles sealed *with the seal of the defendant;* whereby the plaintiff, in consideration of 6000*l. paid by Lord* Rokeby, covenanted *with the defendant, his heirs and assigns*, that he (the plaintiff), his heirs, &c. would, at the cost of Lord *Rokeby*, his heirs, &c. on or before the 13th of *May* 1803, by such conveyances as Lord *R.* should require, convey to Lord *R.*, &c. in fee, certain premises in the county of *York*, &c., with such warranty, &c. as Lord *Rokeby* should require, &c. *In consideration whereof*, the defendant *for himself, his heirs, executors*, &c. *on the part and behalf of the said Lord Viscount* Rokeby, did thereby covenant with the plaintiff *that Lord V.* Rokeby, *his heirs*, &c. should pay to the plaintiff the said 6000*l.* the purchase-money at the time of sealing and executing of the conveyances aforesaid; with a proviso that if Lord *Rokeby*'s counsel should not approve of the plaintiff's title to the premises, or if Lord *R.* should die before the said 13th of *May* next, the agreement should be void. The plaintiff then averred his seisin in fee of the premises, and that his title was approved by Lord *Rokeby*'s counsel, and that Lord *R.* was still living; and that though the plaintiff was willing to execute proper conveyances to Lord *R.*, his heirs, &c. at their costs, &c. *of all which premises Lord* R., after the making of the said articles, *had notice;* and although the plaintiff, after making the articles,

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APPLETON *against* BINKS.

and before the 13th of *May* next ensuing, &c. gave notice *to Lord* Rokeby *and the defendant* that the plaintiff and his wife were ready and willing to convey *to Lord* R., *his heirs*, &c. yet Lord *Rokeby* has not paid to the plaintiff the said 6000*l*. the purchase-money, but has refused, &c.; nor did Lord *R*. require any conveyance, &c., but declined so to do: contrary to the effect of the articles and the covenant of the defendant; &c. whereby the defendant has broken his covenant, &c. to the damage of the plaintiff, &c. To this there was a general demurrer and joinder.

W. Jackson, in support of the demurrer, proposed to argue, 1st, that a deed could not be made by an *agent, as such*; or, 2dly, that if it could, covenant did not lie against him, upon articles describing him to be merely *agent* for another. But

The Court said that it was impossible to contend that where one covenants for another he is not to be bound by it; the covenant being in *his own* name "*for himself, his heirs*," &c. There was nothing unusual or inconsistent in the nature of the thing, that one should covenant to another that a third person should do a certain thing, as that he should go to *Rome*. The party to whom the covenant is made may prefer the security of the covenantor to that of his principal. Here the defendant covenants *for himself*, not in the name of his principal, and puts his own seal to it. There is nothing against law in it, if he will bind himself for his principal. He probably consented to it upon an indemnity.

Judgment for the Plaintiff (*a*).

Holroyd was to have argued for the plaintiff.

(*a*) Vide *Frontin* v. *Small*, 1 *Stra*. 705. 2 *Ld. Ray*. 1418. *Macbeath* v. *Haldimand*, 1 *Term Rep*. 172.; and *Unwin* v *Wolesley*, *ib*. 674. Vide also *White* v. *Cuyler*, 6 *Term Rep*. 176., and *Wilkes* v. *Back*, 2 *East*, 142.

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Tuesday, May 8th.

HENSHALL *against* ROBERTS and Others, in Error.

A count upon an account stated with the plaintiff's *executrix*, &c. (not saying *as* executrix, &c.) cannot be joined with counts on promises to the testator; for it is no allegation that the promises were made to the plaintiffs in their representative capacity; and under such a count proof might be given of an account stated with them in their individual characters. *Qu.* Whether if it had been laid to be on *an account stated* with the plaintiffs themselves, though named *as executrix*, &c. it could be so joined, as the cause of action would still appear to have arisen in the time of the executrix, &c., though the money, when recovered, would be assets?

S. *Henshall* was attached to answer *Sarah Roberts* and others, executrix and executors of the last will and testament of *William Roberts* deceased, which *W. R.* was executor, &c. of *W. Danson*, of a plea of trespass on the case, &c. For that whereas the defendant *Henshall* in the lifetime of *Danson* was indebted to *Danson* in 500*l.* for goods sold and delivered by *Danson* in his lifetime to the defendant *Henshall* at his request, he the defendant, in consideration thereof, promised *Danson* in his lifetime to pay him, &c. There were various other counts upon promises made by the defendant to *Danson* in his lifetime. Another set of counts was upon promises to the plaintiffs below, the executors of the executor, the first of which stated that whereas the defendant *Henshall* afterwards and in the lifetime of *Danson* and of *W. Roberts* respectively was indebted to *Danson* in other 500*l.* for goods sold and delivered by *Danson* in his lifetime to the defendant at his request, and being so indebted, the defendant in consideration thereof afterwards, and after the decease of *Danson* and *Wm. Roberts* respectively promised the said *Sarah*, &c. (the plaintiffs below) *executrix and executors as aforesaid* to pay to them the said sum when requested. The declaration also contained the two following counts: " and whereas the defendant *Henshall* afterwards, &c. *accounted with the said* Sarah, &c. (the plaintiffs below) *executrix and executors as aforesaid* concerning divers other sums to the said *Sarah*, &c. (plaintiffs below) *executrix and executors* as aforesaid, from the defendant before that time due and owing, and then in arrear and unpaid; and upon that account the defendant was found in arrear and indebted *to the said* Sarah, &c. *executrix and executors* as aforesaid in the further sum, &c.

the

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HENSHALL *against* ROBERTS and Others, in Error.

the defendant afterwards, &c. promifed the faid *Sarah*, &c. *executrix and executors as aforefaid*, to pay them, &c. when requefted. And whereas the defendant *Henfhall* was indebted to the faid *Sarah*, &c. *executrix and executors as aforefaid*, in the further fum of 500*l.* for certain *intereft* before that time due and owing from the defendant to the faid *Sarah*, &c. *executrix and executors as aforefaid for and on account of the faid* Sarah, *&c. executrix and executors as aforefaid*, at the inftance of the defendant, *having forborne and given day of payment* to the defendant of divers fums due and owing *to the faid* W. Danfon *in his lifetime*, and at the time of his death by the defendant then due and owing to them the faid *Sarah*, &c. *executrix and executors as aforefaid*, the defendant, in confideration thereof promifed the faid *Sarah*, &c. *executrix and executors* as aforefaid to pay them, &c.: yet the defendant not regarding his faid feveral promifes, &c. but intending to defraud the faid *W. Danfon* in his lifetime, and the faid *Wm. Roberts* after the death of *Danfon* in his lifetime, who furvived *Danfon* and was *Danfon*'s executor, and alfo the faid *Sarah*, &c. executrix and executors as aforefaid fince the deceafe of *Danfon* and of *W. Roberts*, hath not paid, &c., and therefore the faid *Sarah*, &c. bring their fuit, &c., and the faid *Sarah*, &c., bring into court here the letters teftamentary of *Danfon*, whereby it appears that *Wm. Roberts* was the executor of *Danfon*, &c., and alfo the letters teftamentary of *Wm. Roberts*, whereby it appears that the faid *Sarah*, &c. are executrix and executors of *Wm. Roberts*, &c.

After judgment by nil dicit and a writ of inquiry to affefs damages, and final judgment in the court of Common Pleas in *Trinity* term laft, a writ of error was brought in this court; and amongft other common errors it was affigned for error, that in fome of the counts the plaintiffs

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have declared upon promises made to *W. Danson* deceased, in his lifetime, and upon certain other promises made to the plaintiffs *as executrix and executors* as aforesaid, and also upon promises made to the plaintiffs upon a cause of action accruing to them *in their own right*, viz. for interest due from the defendant to the plaintiffs for and on account of the plaintiffs having forborne and given day of payment to the defendant for divers sums, &c. Joinder in error.

Jervis, for the plaintiff in error, insisted on the misjoinder of the count upon *the account stated* with the plaintiffs below in their own right, in the same declaration with counts upon promises to their testator, which could only be recovered in their representative character; because the same judgment could not be given on the two different descriptions of counts. *Jennings* v. *Newman* (*a*), and *Rogers* v. *Cook* (*b*). And where the action is upon promises made to the executors upon a cause of action arising in their time, they are liable to costs if they fail; and the naming themselves *executors* is not material. *Nicholas* v. *Killegrew* (*c*), and *Wallis* v. *Lewis* (*d*). The very form of the count upon an account stated with the executors seems to imply a cause of action in their own time; though it has been usual to add such a count in actions by or against executors; and in *Secar* v. *Atkinson* (*e*) it was holden to be no misjoinder with counts on promises made by the intestate. But there the plaintiff declared that he had accounted with the defendant *as administratrix*, and here the account is only alleged to have been stated with the plaintiffs below, "*executrix and executors*," not saying "*as* executrix," &c.; which is no allegation that the debt arose to them in their representative

(*a*) 4 *Term Rep.* 347. (*b*) 1 *Salk* ·o. (*c*) 1 *Ld. Ray.* 436.
(*d*) *Ib.* 1215. (*e*) 1 *H. Blac.* 102.

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character. *Brigden* v. *Parkes* (*a*). But at any rate the last count for *interest* on a forbearance by the plaintiffs below must be founded on a cause of action arising in their own time, which therefore clearly cannot be joinder with the other counts. It is not sufficient that the principal was due to the testator in his lifetime; for if a new security be taken by the executor, as a promissory note, he cannot declare on that jointly with other promises to the testator. *Betts* v. *Mitchell* (*b*). A fortiori then he cannot recover interest accruing in his own time with any other count on promises to him merely as executor. It is true, that *Buller* J. in *King* v. *Thorn* (*c*), and in *Cockerill* v. *Kynaston* (*d*), says, that the only question in such cases is, whether the sum when recovered will be assets of the testator; but that rule was doubted in *Bollard* v. *Spencer* (*e*); and though adverted to again in *Ord* v. *Fenwick* (*f*), yet there the promise was laid to be made to the plaintiff "*as executrix.*"

Bosanquet contrà, observed, that by necessary implication where the parties to whom the promise was alleged to be made named themselves "executrix and executors," it must be taken to have been made to them in their representative capacity, and meant the same as if it had been said "*as* executrix," &c.; more especially when it is said, "executrix, &c. *as aforesaid*," which refers to the antecedent counts, in which it is admitted that they sued in their representative characters. [Lord *Ellenborough* C. J. We cannot import any thing from the other counts; we must look to this upon the account stated, and see whether it

(*a*) 2 *Bos. & Pull.* 424.
(*b*) 10 *Mod.* 316.
(*c*) 1 *Term Rep.* 489.
(*d*) 4 *Term Rep.* 281.
(*e*) 7 *Term Rep.* 358.
(*f*) 3 *East*, 110.

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can be joined with the rest.] In the very beginning of the declaration it is stated, that the defendant was attached to answer the plaintiffs, *executrix and executors*, &c.; and in the conclusion they make a profert of the letters testamentary, which shews that they sued as such.

Lord ELLENBOROUGH C. J. That leaves the question as before. It is the same as if it were said, "*A.*, *B.*, &c. being executor," &c. it is not an allegation of their suing *as such*; and we can supply nothing by intendment. If it had been alleged that they sued *as executrix*, &c. that would have been enough to have raised the other question, Whether a count upon promises on *an account stated* with one as executor can be joined with other counts on promises with the testator? upon which there are authorities both ways. The cases in favour of the proposition are *Bull* v. *Palmer* (*a*), and *Mason* v. *Jackson* (*b*), together with the opinion of Mr. Justice *Buller* in the cases cited, that wherever the sum recovered by the executor on promises to himself would be assets in his hands, there the count may be joined with counts on promises made to the testator. But there are many authorities the other way, and I think you will hardly find the point tenable. However, if you wish to have time to look into the first point, to see if the question can be raised on this record, the Court will give you leave to mention it again, if you think it will admit of argument. At present,

Per Curiam, Judgment nisi, &c. for the Plaintiff in Error.

And *Bosanquet*, a few days afterwards, said that he could not get rid of the preliminary objection.

(*a*) 2 *Lev.* 165. (*b*) 3 *Lev.* 60.

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A fentence of a foreign court of prize is conclufive evidence in an action upon a policy of infurance upon every matter within the jurifdiction of fuch court upon which it has profeffed to decide. Therefore where a *Danifh* fhip, *warranted neutral*, was captured by a *French* fhip of war, (*Denmark* being at peace with *France*), and the court in which fhe was libelled as prize, profeffing to confider that the *built* of the veffel was *unknown*, that fhe was *fold* to a *neutral* fubject *only fince* the declaration of war, that the bill of fale does not mention her *place of built* or her *original owner*, that the mate and third officer were naturalized *Danes only fince* the declaration of war, and that the greater part of the *crew* were fubjects of *hoftile* powers, condemned the fhip as *good and lawful prize*; fuch condemnation is conclufive againft the warranty of neutrality in an action on the policy againft the underwriter; and no evidence could be received to falfify the facts affirmed by fuch fentence, nor to fhew that the conclufion was unfounded: although the fentence proceeded to refer to certain ordinances of *France* containing rules to direct the judgment of its Courts in the confideration of the queftion of neutrality; by which rules the Prize Court appear to have regulated their judgment in the conclufion they had drawn.

THIS was an action againft an underwriter upon a policy of infurance effected by the Plaintiff as agent, refiding in *Great Britain*, upon the fhip *Oxholme* and her cargo, both *warranted Danifh*, at and from the ifland of *Saint Thomas* to the coaft of *Africa*, during her ftay and trade there, and at and from thence to *Surinam*, with leave to call at *Bermuda* outward bound, with leave to exchange goods and flaves with any veffels. The Plaintiff in his declaration averred the intereft in fhip and cargo to be in *James Hazzell*, *James Murphy*, and *R. D. Jennings*, who during the time of the infurance and lofs, were and ftill are *Danifh* fubjects, and that the fhip and cargo were *Danifh*; and that during the voyage infured, the fhip and cargo were hoftilely feized, taken, and carried away upon the high feas by perfons unknown. Plea the general iffue. At the trial at *Guildhall* a fpecial verdict was found, in fubftance as follows:

The plaintiff was the agent refiding in *Great Britain*, and on account of *J. Hazzell*, *J. Murphy* and *Jennings*, caufed to be made the policy in queftion, which was fubfcribed by the Defendant, upon the fhip *Oxholme* and goods. The cargo was loaded on board the fhip at the Ifland of *Saint Thomas* for the voyage infured; and the fhip *Oxholme* warranted in the policy to be a *Danifh* fhip at the time of lading of the goods on board, and of the making of the policy and until the capture and lofs after mentioned, *was a Danifh fhip, and the property of the faid J. Hazzell,*

J. Mur-

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Murphy and R. D. Jennings, and that the said cargo were also *Danish* property of the said *J. Hazzell*, &c. and the said *J. H. J.*, *M.* and *R. D. J.* were, during all the time aforesaid, *subjects of the King of* Denmark, *residing and domiciliated at the* Danish *Island of* St. Thomas, and *interested in the said ship and cargo* to the amount of the sum insured. The ship when she sailed, and during her whole voyage, until, and at the time of the capture, had on board, *together with all other papers and documents usually carried by* Danish *ships*, to shew that she was a *Danish* ship, the papers following, *viz.* a *Latin* pass, a *Mediterranean* pass, a bill of sale, a muster roll, a measure brief, a certificate of property, and *every other document generally carried by* Danish *ships*. The first and second mate, and other officers and the crew of the ship during the voyage were *Danes* and *Swedes*, except one man on board at the time of the capture, who alone was a subject of any nation in a state of hostility to *France*. At the time of making the policy, until and at the time of the capture, there was open war between *Great Britain* and *France*. The ship with her cargo on board failed from *St. Thomas*, and in the course of the voyage insured, was captured by two *French* frigates and carried into the *French* island of *Senegal*, where proceedings were instituted before the tribunal for determining questions of prize; when they proceeded, upon the grounds stated in the following sentence, to condemn the ship and cargo as good and lawful prize, and ordered them to be sold, and thereby they became wholly lost to the assured. The sentence of condemnation was as follows: "Liberty—Equality. I *Emlec Blanchot*, Commandant and Administrator of *Senegal*, &c. assisted by Citizen *S. M.* chief of the civil courts of marine in this Island, *P. A.* and *P. B.* merchant, and *J. F. C.* re-

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giſtrar of this Colony, having ſeen the verbal proceſs of the capture of the ſhip *Oxholme* carrying *Daniſh* colours, Captain *J. Fowle*, ſeized the 30th of *Germinal* laſt by the frigate of the Republic *Regenerée*, commanded by Citizen *Williamets*, captain of a veſſel; having examined and compared all the inſtruments and papers relating to the ſaid ſhip *Oxholme*, particularly two muſter rolls, one in the *Daniſh* language, dated 15th *November* 1797, and the other in the *Engliſh* language, dated 17th *November* 1797, the bill of ſale of the aforeſaid ſhip, dated 24th *May* 1796, ſigned *J. H. J. Plewſher*; conſidering that the veſſel, of what built unknown, was ſold to a ſubject of a neutral power only ſince the declaration of the preſent war, and that the bill of ſale makes no mention either of her place of built or of her original owner; that the mate and the third officer were naturalized *Danes* only ſince the declaration of the preſent war; and the greater part of the white men of the crew are ſubjects of hoſtile powers; I decree the ſaid veſſel the *Oxholme* to be *good and lawful prize, conformably to the* 10*th* 11*th and* 12*th articles of the regulations concerning prizes of the* 21*ſt of* October 1744, which are thus worded: "Every veſſel of enemy's built, or which ſhall have been owned by an enemy, ſhall not be deemed to be neutral or belonging to an ally, if there be not found on board ſome authentic inſtruments, certified by public officers who may aſcertain the date of them, which prove that the ſale or tranſfer thereof was made to ſome one of the ſubjects of allied or neutral powers before the declaration of the war," &c. "No reſpect ſhall be paid to paſſports granted by neutral or allied powers to the owners or maſters of veſſels who are ſubjects of hoſtile ſtates, if they were not naturalized before the declaration of the preſent war." "All foreign

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vessels shall be lawful prizes on board of which there shall be a supercargo, merchant, clerk, or marine officer of any of his Majesty's enemies, or of which the crew shall consist of more than in the proportion of one-third of seamen who are subjects of hostile states." Accordingly, I decree the said vessel the *Oxholme* to be sold in the usual form, and the proceeds to be delivered to whom of right they belong. Done at the government house of the *French* island of *Senegal*, the 15th day of the month of *Prairial*, of the sixth year of the *French* Republic, one and indivisible. Signed *Paul Benis*, *Marca Malivon*, *Blanchot*, *Charbonier* Registrar." But whether, &c.

Jennings for the Plaintiff contended, 1st, That the sentence of the prize court appeared upon the face of it to be grounded upon *French* ordinances, which not being binding upon other nations who had not expressly stipulated by treaty to be bound by them, could not contravene the warranty of neutrality. 2dly, That the conclusion drawn in the sentence was not warranted by the premises, which on the contrary rather tended to prove the warranty of neutrality; and 3dly, That the sentence of a foreign court of admiralty was only binding in rem, so as to alter the property in the thing itself condemned as prize; but did not conclude the question of neutrality arising in any other court of competent jurisdiction. He argued at length upon these topics, and cited many cases. But it is unnecessary to repeat arguments and authorities which have been so frequently and ably discussed of late, and particularly by all the Judges in the case of *Lothian* v. *Henderson* in the House of Lords, reported at length in 3 *Bos.* and *Pull.* 499.

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Caſſels, for the Defendant, contended, 1ſt, That a warranty muſt be conſtrued ſtrictly; and that where a ſhip was warranted neutral, ſhe muſt be documented and navigated in ſuch a manner as to entitle her to all the privileges of neutrality wherever that queſtion comes into diſcuſſion. 2dly, That where a neutral ſhip is condemned by a foreign court of competent juriſdiction, whatever is decided by the ſentence of that court is concluſive in any other court here, where the ſame point comes in iſſue: and that although the point be not in terms decided, and the words of the ſentence be ambiguous, yet if it can be fairly collected what the foreign court meant or profeſſed to decide, it is equally concluſive. 3dly, That a general adjudication of *good and lawful prize* falſifies the warranty of neutrality. 4thly, That a ſentence of condemnation, formal or informal, juſt or unjuſt, with or without reaſons, if founded in any part of it on the ground of the ſhip's being conſidered as enemy's property, is concluſive againſt a warranty of neutrality. He admitted that ſome of the caſes had gone further, and had laid down, 5thly, That although there be in the ſentence a general adjudication of good and lawful prize, as the concluding or decretal part of it; yet that if the reaſons leading to the concluſion were therein ſtated, and thoſe reaſons did not either diſtinctly or by fair inference falſify the warranty of neutrality, the court would examine their validity, and receive other evidence dehors the ſentence upon the point of neutrality. But he contended that the reaſons ſtated did, fairly conſidered, falſify the warranty in this caſe. And further he admitted, 6thly, That where a ſhip has been condemned by a *French* court of admiralty, and as reaſons for that condemnation *French* ordinances are ſtated to have been broken, the court here have been

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confidered at liberty to examine whether thofe ordinances were or were not conformable to the law of nations. But he contended that thefe ordinances were conformable to that law. He argued at length upon thefe feveral topics, and obferved on fome of the cafes.

Curia adv. vult.

Lord Ellenborough C. J. now delivered the opinion of the Court.

Since the judgment of the Houfe of Lords in *Lothian* v. *Henderfon*, it may now be affumed as the fettled doctrine of a court of *Englifh* law, that all fentences of foreign courts of competent jurifdiction to decide queftions of prize are to be received here as conclufive evidence in actions upon policies of affurance, upon every fubject immediately and properly within the jurifdiction of fuch foreign Courts, and upon which they have profeffed to decide judicially. In this cafe, the queftion, How far the alleged neutrality of the fhip *Oxholme*, defcribed in the policy of infurance as a *Danifh* fhip, was, under the circumftances maintained, or falfified, is a queftion, to the decifion of which the *French* prize court at *Senegal* was undoubtedly competent. And if that Court, before which proceedings for the condemnation of this veffel as prize were inftituted, has, in the profeffed and actual exercife of the functions of a prize court, decided thereupon, fuch decifion muft have the effect of concluding the queftion. It remains, therefore, only to afcertain, by a reference to the terms of the fentence itfelf, whether it have fo decided. In the firft place, the Court, in every part of the fentence, confiders the cafe depending before it as a cafe of litigated *neutrality*. It ftates the *Oxholme to have carried* Danifh *colours, and* fo far to have been

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been *ostensibly* a *Danish* vessel. After mentioning the written documents belonging to the ship found on board, it suggests, as drawing its neutrality into suspicion, that its *built was unknown*; and further, that it was *sold to a subject of a neutral power only since the declaration of the present war*; and that *the bill of sale made* no *mention* of her *place of built*, or of her original owner. It then exhibits the quality and description of the officers and crew, as affording similar matter of suspicion, as affecting her neutrality; viz. "that the *master and the third officer* were NATURALIZED *Danes only since* the *declaration* of the PRESENT *war*;" and "*that the greater part of the white men of the crew were subjects of* HOSTILE *powers*." It then proceeds to *decree the* Oxholme to be *good and lawful prize*, conformably to certain regulations of *France* in the year 1744 concerning prizes; by which it is declared that vessels of enemy's built *should not be deemed neutral*: that the passports granted by neutral or allied powers should not be *respected*, if granted to masters of *vessels* subjects of *hostile states* and *not naturalized before the declaration of war*: and that vessels should *be lawful prizes* on board of which certain specified officers, being *enemies*, should be found, or of which the crew should consist of more than one third of seamen subjects of hostile states. Looking, therefore, at the whole of the sentence, including the ordinance to which it professes to conform, it is impossible not to see that the *French* prize court canvassed and decided upon the probability of the ship's actually being, or the fitness of its being presumptively deemed, enemy's property, or at least not neutral, in respect of certain established *indicia* on that head, collected together in the ordinance referred to. And having, in respect of such

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circumstances so stated and detailed, decreed the vessel to be *good prize*, it appears to us that we should do a violence to the fair meaning and import of the whole of the context if we should hold the Court to have so decided and decreed upon any other ground than this, viz. that the fact, which is the subject of the warranty, was in their judgment substantially untrue. And having so decided, we are bound, upon the principles before stated, to give a conclusive effect to such their judgment, and to hold the warranty of "*Danish* ship" to be thereby fully disproved, and the plaintiff thereby also of course barred from recovering upon the policy in which such warranty is contained.

Judgment for the Defendant.

Wednesday, May 9th.

DOE, on the Demise of CHARLES WHITE, *against* SIMPSON and Another.

Under a devise of lands, arrears of rent and a bond and judgment to *trustees* and *the survivor* and *the executors*. &c. of such survivor, in trust, *out of the rents and profits* of the said estates and arrears, &c. to pay certain *annuities for lives*, and *a sum in gross*; and from and after payment of the said annuities and money, the testator devised successive estates for lives, remainder to *C. W.* in tail, remainder to his own right heirs; and he also gave a general power of *leasing* to the trustees for the best rent, with an allowance of 10*l.* a year to each for their trouble: held that *the purposes of the trust being all answered*, by the death of the annuitants, and the raising of the money for legacies, the remainder-man in tail (the life estate being spent) took the *legal estate* in the premises. For where the purposes of a trust may be answered by giving the trustees a less estate than a fee, no greater estate shall pass to them *by implication*; but the uses in remainder limited on such lesser estate so given to them shall be executed by the statute. And in this case it is sufficient to answer the purposes of the trust to give the trustees by implication an estate *for the lives of the annuitants*, with *a term of years in remainder* sufficient for the purpose of raising the gross sum charged *out of the rents and profits*. And this construction is further confirmed in this particular case by the bequest to the trustees of the *arrears and the bond and judgment*, as well as of the rents and profits; for otherwise the interest in the bond, &c. would go to different representatives than the estate if the trustees took a fee: and the *leasing power* was only to be executed as the occasions of the trust required. And there was also a *personal* remuneration to the trustees of 10*l.* a-year for their trouble, which was not extended to their *heirs*.

THIS was an ejectment for certain premises in the parish of *St. Matthew, Bethnal Green*, in *Middlesex*, brought by the first remainder-man in tail under the will

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of one *Charles White*, against the Defendant, who claimed as assignee of one *Hopkins*, under a lease granted in *August* 1786 by the executrixes of *Henry Hyatt*, the surviving trustee under the will of *Charles White*, dated *July* 1754, and properly executed and attested; whereby the said devisor having first devised unto the said *Henry Hyatt* all his messuages, lands, &c. whatsoever in the parish of *Willsdon* for life, with divers remainders over for life, remainder to *Charles White* in tail; and having given directions for the renewal of a certain church lease, &c.; proceeds as follows:

" I give and devise unto the said Mr. *H. Hyatt*, my cousin *Fitz Ferrand*, and Mr. *Syddall*, and the survivor of them, *and the executors and administrators of such survivor*, all those my messuages, lands, &c. whatsoever, in *London*, *Kensington*, and in the parish of *St. Matthew Bethnal Green*, *Middlesex*, together with all arrears of rent due from the tenants of the said estates, and the bond and judgment I have from my tenant *John Sugar* for arrears due; in trust, that they, *out of the rents and profits of the said estates* and arrears due, shall pay one annuity of 50*l.* to my sister Mrs. *Holme* for her life, by half yearly payments from the time of my decease; and also to pay one other annuity of 50*l.* to my sister Mrs. *Dickinson* for her life by half yearly payments, for her sole and separate use, &c. And *from and after payment of the said annuities*, then in trust *out of the said rest and residue of the said rents and profits* to pay to my brother *Thomas White*, and my nephew, his son, *Charles White*, and *Peter Holme*, and the survivor of them, and the executors, &c. of such survivor, the sum of 800*l.* to be *by them* paid and applied to the sole use and benefit of the said children of my said brother *William*, in such manner and proportion, and to and for

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ſuch uſes, &c. as they ſhall think beſt. And *from and after payment of the ſaid annuities* and *the ſaid ſum of* 800*l.* I give and deviſe my ſaid eſtates in *London* and *Middleſex* laſt mentioned to my brother *William* for life, remainder to his eldeſt ſon *William* for life, remainder to his ſecond ſon *Samuel* for life, remainder to his third ſon *Charles* for life, remainder to his youngeſt ſon *John* for life, remainder to my brother *Thomas White* for life, and after his deceaſe to his ſon, my nephew, *Charles White* (the leſſor of the plaintiff,) *and his heirs male;* and for want of ſuch iſſue to my right heirs for ever. And I do hereby give and grant unto the ſaid Mr. *Hyatt*, Mr. *Ferrand*, and Mr. *Syddall*, and the ſurvivor of them, and the executors and adminiſtrators of ſuch ſurvivor, full power and authority *to grant any building leaſe and leaſes, or any other leaſe and leaſes, as often as there ſhall be occaſion, of the ſaid eſtates ſo deviſed to them* in truſt as aforeſaid, or any part thereof, *for any number of years; ſo as* ſuch leaſe and leaſes, ſo to be granted, be made *for the moſt or beſt rent* that can be had or got for the ſame, without any fine or income. And I hereby direct, that ſo long as the ſaid Mr. *Ferrand* and Mr. *Syddall* ſhall act in the ſaid truſt, they ſhall *be paid or allowed every year the ſum of* 10*l. apiece for their trouble.* But it is my will and mind that they the ſaid Mr. *Hyatt*, Mr. *Ferrand*, and Mr. *Syddall*, ſhall be only accountable for their own ſeveral acts," &c. The will contained other bequeſts not material to be ſtated. The deviſor died in *July* 1754.

At the trial before Lord *Ellenborough* C. J. at the Sittings at *Weſtminſter* after *Michaelmas* Term laſt, it clearly appeared that the leaſe under which the defendant claimed was void under the power granted to the truſtees, the beſt rent not having been reſerved; and the jury

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jury found a verdict for the lessor of the plaintiff on that ground. But objection was taken at the trial, (which was reserved to the defendants' counsel, with liberty to move to enter a nonsuit if the Court should sustain the objection), that the legal title was not in the lessor of the plaintiff, the first remainder-man in tail under the will; but (all the trustees being dead) in the heir of *H. Hyatt*, who survived the other trustees and died in *November* 1774. It appeared however, that of the two annuitants mentioned in the will, Mrs. *Holme* died in the lifetime of the devisor, and Mrs. *Dickinson* after him in the year 1762, and the last tenant for life died in 1803, immediately prior to the bringing this ejectment. Also the sum of 800*l.* mentioned in the will had been raised and applied as long ago as *January* 1771, when all the purposes of the trust were satisfied. Lord *Ellenborough* C. J. was of opinion at the trial that the trustees did not take the legal estate for any longer time than the lives of the annuitants, and until the gross sum of 800*l.* was raised, and the purposes of the trust satisfied: but if that were otherwise, yet after all the purposes of the trust were at an end, he said he would direct the jury to presume a re-conveyance, if necessary, to the persons beneficially entitled under the will. But it was afterwards objected by the defendants' counsel, that the power of leasing was intended by the testator to be given to the trustees during the continuance of the successive particular estates carved out of the inheritance; and that the exercise of such a power necessarily required a seisin in fee of the trustees to support it. And thereupon the verdict was entered for the plaintiff, with liberty to the defendants to move to set it aside and enter a nonsuit, if

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the Court ſhould be of opinion that the objection to the title of the leſſor of the Plaintiff were well founded. A rule niſi having been accordingly obtained in *Hilary* Term laſt for that purpoſe,

Wood (who was with *Erſkine* and *Garrow*) ſhewed cauſe againſt the rule; and contended that the truſtees took only a chattel intereſt under the will for the payment of the annuities during the lives of the annuitants, and for raiſing the ſum of 800*l.* for the legatees; and when thoſe purpoſes were anſwered, which they were as far back as 1771, the legal eſtate was limited over to the ſeveral takers for life, remainder to the leſſor of the plaintiff in tail, in whom it is now veſted in poſſeſſion. A deviſe to truſtees *and their executors and adminiſtrators*, for the payment of debts and legacies, has been often holden to give them only a chattel intereſt, and when the purpoſes are anſwered the legal eſtate goes over. As in *Co. Lit.* 42. *a.* " If a man deviſe his lands to his executors for payment of debts and until his debts be paid, they have but a chattel and an intereſt uncertain in the land until his debts be paid:" " and being a chattel, it ſhall go to the executor or executors for the payment of his debts." And ſo it was reſolved in Sir *W. Cordell*'s caſe (*a*), and in *Hitchins* v. *Hitchins* (*b*). The deviſe to the truſtees, being alſo for the payment of the annuities for life, will not vary the queſtion; for the truſtees will take no greater eſtate than is ſufficient to anſwer the purpoſes of the truſt. In *Barnardiſton and others* v. *Carter*, in Dom. Proc. (*c*) under a deviſe to executors for payment of debts and legacies, it was decreed that they had but a chattel

(*a*) Cited in 8 *Rep.* 96. and *Cro. Eliz.* 316.

(*b*) 2 *Vern.* 403.

(*c*) 1 *P. Wms.* 509. 519. 2 *Bro. P. C.* 1.

intereſt;

interest. And by the report in *Brown* it appears that one of the legacies was a rent charge (*a*) for the lives of two persons and the survivor. In other cases where the devise has been to trustees and *their heirs* in trust for payment of debts, legacies, and annuities, they have been holden to take no greater estate than such as was commensurate with the purposes of the trust: after which the limitations over took effect as legal limitations; as in *Lord Say and Sele* v. *Lady Jones* (*b*). That was a devise to trustees and their heirs in trust to pay legacies and annuities, and to pay the surplus to a feme covert for life to her separate use, and after her death the trustees to stand seised to the use of the heirs of her body in tail general, subject to the payment of the several annuities; remainder over. And Lord Chancellor *King* held that the use was executed in the trustees and their heirs during the life of the feme covert, and after her death it was executed in the persons entitled to take charged with the annuities. [*Lawrence* J. I have heard Lord *Kenyon* say, that that was a single case, standing on its own grounds (*c*).] The same principle was established in *Shapland* v. *Smith* (*d*), and in *Silvester* v. *Wilson* (*e*), that under a devise to trustees to receive and pay out of the rents and profits annuities for lives, they shall have no greater estate than is sufficient for the purposes of the trusts created. Then it is argued from the power of leasing given to the trustees, that the testator meant to give them a fee; but that is not the ne-

(*a*) This rent charge was given "*after* such time as his *said debts and legacies* should be discharged;" and no question was made on this ground.

(*b*) 3 *Bro. P. C.* 458. 8 *Vin. Abr.* 262.

(*c*) Vide *Harton* v. *Harton*, 7 *Term Rep.* 654.

(*d*) 1 *Bro. Ch. Rep.* 74. (*e*) 2 *Term Rep.* 444.

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ceffary inference from the words of the devife. The power of leafing was meant to be confined to the duration of the intereft the devifor had before given to the truftees, and commenfurate only with the purpofes of the truft. And, a *power* to any extent may be granted to one without giving him the fee, or without giving him an intereft commenfurate with the leafe which he may grant. Befides, the jury were inftructed at the trial, that even if the legal eftate continued in the truftees after the purpofes of the truft were fatisfied, yet the jury might prefume a re-conveyance of it by the truftees to the remainder-man in tail, after thofe purpofes were anfwered. And here a fufficient length of time has elapfed to warrant fuch a prefumption; the laft annuitant having died above 40 years ago, and the laft of the legacies having been paid off in *January* 1771. In a cafe where much lefs time had elapfed, Lord *Kenyon* faid he would direct a jury to prefume a furrender of a fatisfied term (*a*).

Gibbs, (*Park* and *Rofe* were with him) contrà, contended, that the devife to the truftees to pay annuities for lives, and a grofs fum out of the lands devifed, gave them the fee, for otherwife the eftate might not be fufficient to anfwer the charge. *Cordell*'s cafe (*b*) was only a devife to *executors* to pay debts; a mere power to raife money: and the grounds on which *Barnardifton* v. *Carter* was decided in the Houfe of Lords, cannot be collected from the report. But in *Jenkins* v. *Jenkins* (*c*), where an annuity was devifed

(*a*) Vide *Doe* v. *Sybourn*, 2 *Term Rep.* 696., and *Goodtitle* v. *Jones*, 7 *Term Rep.* 49.

(*b*) Cited 8 *Rep.* 96., and *Cro. Eliz.* 316.

(*c*) *Willes*, 650., where the cafes are collected.

vised to one for life, to be paid out of certain lands by the executor to whom those lands were afterwards devised, the Court had no doubt that the executor took an estate at least during the life of the annuitant; and they inclined to think he took the fee; but that was not necessary to be decided, as the annuitant was still living. But at any rate the leasing power given to the trustees shews an intention to pass the fee to them; for it is clear that the duration of the lease could not depend upon the payment of the legacies. And as no such power of leasing is given to the tenants for life or in tail, the devisor must have intended that the trustees should retain the power of leasing during the continuance of those estates at least. The calling it a power will not prevent the implication of a fee to the trustees, if the exercise of the power require them to take such an estate. As to the presumption of a re-conveyance by the trustees, supposing them to take the fee, that was a fact for the jury, which they have not found.

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Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered judgment.

This was a motion for a new trial, (or that a nonsuit should be entered) on the ground that the legal estate in the premises for which the ejectment was brought was not in the lessor of the plaintiff, but in the heir of the surviving trustee, under the will of one *Charles White*, made in the year 1752; and that consequently the ejectment should have been brought on the demise of such heir of the surviving trustee. The question arises on the will of the said *Charles White*, made the 1st of *December* 1752, (which his Lordship stated.) The lease under which the

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the defendant claimed has been found by the jury to be void, as not having been made pursuant to the leasing power contained in the will: but it was contended by the counsel for the defendants, that the ejectment was ill brought in the name of *the lessor of the Plaintiff*, *Charles White*, the *first remainder-man in tail*, for the reason before stated, viz. that the legal estate was not in him. The validity of which objection depends upon the question, Whether the original trustees took, by necessary implication arising from the whole of the will, (as the defendants' counsel contended they did,) an estate *in fee*; or, as the plaintiff's counsel contended, a *chattel interest*, or estate for such limited period only as will be sufficient to carry into execution the trusts of the will, *i. e.* for the purpose of securing the payment of the two annuities of 50*l.* each, and the gross sum of 800*l.*? and whether after those trusts were satisfied, the several limitations for life and in tail took effect as legal limitations? The case principally relied upon by the defendants' counsel, in support of the proposition that the trustees took an estate in fee, was the case of *Jenkins* v. *Jenkins*, Lord C. J. *Willes's Rep.* 650. In that case the testator *John Jenkins*, being seised in fee, by his will gave one *Mary Harper* 5*l.* a-year to be paid her OUT OF THE PREMISES in question *by his executor* as long as she should live, and to be paid quarterly, and the Court founded its opinion on this ground, viz. "that as the annuity was to be paid by "the *executor*, and to be paid *out of the estate*, the intent "of the devisor could not take place unless the executor "had at least such an estate in the lands devised as would "last as long as the annuity was payable." And Lord Ch. J. *Willes* adds, "Whether he has an estate for the "life

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" life of the annuitant only, or in fee, we need not de-" termine in this action, because the annuitant is alive; " but we are rather inclined to think that he took an " estate in fee; because there is no one case where a de-" visee by virtue of the word "*paying*" has been adjudged " to have a larger estate than for his own life, in which " it has not also been adjudged that he took an estate in " fee." But in the present case nothing turns on the import of the word *paying*; nor was the payment directed by the will to be made by the trustees *out of the estates* devised, so as to be a personal charge on them, but *out of the rents* and *profits* only; which words in a multitude of cases have been holden not to give more than an estate for life, as the devisee cannot be a loser in respect of such a charge. Of the several cases cited by Mr. *Wood*, two of them which have the most immediate bearing on this question, viz. *Shapland* v. *Smith*, 1 *Bro. Ch. Rep.* 75., and *Sylvester* v. *Wilson*, 2 *T. R.* 444. appear to establish, that, if an estate for life be left to trustees and their heirs, in trust to *pay the* PROFITS *or an annuity out of* THEM to another for life, and after the death of the annuitant, or person entitled to the profits, if the estate be given to or to the use of another, in such case the trustees take only an estate for the life of the cestui que trust or the annuitant, and the remainder over is executed by the statute; and the authorities referred to, viz. *Co. Lit.* 42. *a. and Sir* W. Cordell's *case*, 8 *Co.* 96. establish the proposition, that if an estate be devised to executors generally for payment of debts, they will take only a chattel interest: from whence it appears to be a fair inference, that where the purposes of a trust can be answered by a less estate than a fee simple, that a greater interest than is sufficient to answer such purpose shall

not

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not paſs to them; but that the uſes in remainder, limited on ſuch leſſer eſtate ſo given to them, ſhall be executed by the ſtatute. I have not met with any caſe in which the truſtees have been holden to take any other intereſt than either a chattel, an eſtate for life, or in fee: but I ſee no reaſon why they may not, in order to anſwer the purpoſes of the truſt, take an eſtate by implication for the lives of the annuitants, with a term of years in remainder ſufficient for the purpoſe of raiſing out of the rents and profits the ſum of 800*l.* directed to be paid out of the ſame. Such an eſtate might certainly be limited by expreſs terms in a deed or will. And the circumſtance of the bequeſt to the truſtees and the perſonal repreſentatives of the ſurvivor of them of the bond and judgment given to the teſtator by a tenant for arrears due, (and which is certainly a matter merely of a perſonal nature,) goes ſtrongly in confirmation of this conſtruction. For if the truſtees were meant to take a fee, then the legal eſtate in the land deviſed, and the intereſt in this bond and judgment, would go to different claſſes of repreſentatives of the ſame ſurviving truſtees; which apparent inconſiſtency is avoided, if the truſtees take the ſame deſcription of intereſt, (*i. e.* a chattel intereſt in the land,) as they reſpectively muſt do in the bond and judgment. It has alſo been argued on the part of the defendant, that from the terms and object of the *leaſing power* a neceſſary inference ariſes that the teſtator meant to give his truſtees an eſtate in fee. It does not, however, appear to me that the leaſing power fairly affords any ſuch inference. The teſtator gives them *power* and authority to grant *building or other leaſes*, as *often as there ſhould be occaſion*, of the *ſaid eſtates ſo deviſed to them* "in TRUST AS AFORESAID;" hereby evidently connecting the execution

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of the power with the particular truſt eſtates before created, and exhibiting an intention that the leaſing power ſhould be merely commenſurate therewith and auxiliary thereto. The teſtator alſo ſeems to have contemplated the period of the truſt, and of courſe the trouble attending the execution of it, as not being likely to endure beyond the lives of *Ferrand* and *Syddall*, two of the truſtees: for he directs that "ſo long as the ſaid Mr. *Ferrand* and "Mr. *Syddall ſhall act in the ſaid truſt they ſhall be paid* or "allowed *every year* the ſum of 10*l.* a-piece for their "trouble." To the other truſtee, *Hyatt*, to whom he had deviſed an eſtate for life for his own benefit in another eſtate in the beginning of his will, he of courſe thinks it unneceſſary to make this allowance. A yearly allowance made *to truſtees ſo long as they ſhould act*, is not very conſiſtent with an intention in the teſtator to impoſe that trouble upon the heirs of the ſame truſtees without any recompence made to *them* for *their trouble*, and that for ever. The argument on the part of the defendants is, that unleſs the leaſing power continue in the truſtees down to that period of time when ſome perſon ſhould take an eſtate under the will in reſpect of which he might be enabled to grant building leaſes, that the buildings might fall into utter ruin and decay; and that if the truſtees ſhould take this power only during the lives of the two annuitants, and for the time during which the 800*l.* may be raiſed, that the eſtate could not be benefited by the granting ſuch leaſes during the continuance of the ſeveral ſucceſſive eſtates for life, nor even during the continuance of the eſtates limited in tail; for tenants in tail are only enabled to make leaſes under the ſtat. 32 *H.* 8. *c.* 28.: and that for the avoiding of this inconvenience the eſtate deviſed to the truſtees muſt be conſtrued to be an eſtate in fee.

Admit-

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Admitting, however, that if the several devisees for life should survive the period during which the trust for the lives of the annuitants, and for raising the sum of 800*l.*, may continue, the inconvenience suggested, viz. of the suspension of the leasing power for a limited time and to a certain degree might exist; at least till the remainder-man in tail, by suffering a recovery, should acquire to himself a power of making such leases; still, if the inconvenience should subsist to a still greater degree than it is likely to do, it would not warrant us in putting a construction upon the will, in order to avoid it, which the terms of the will do not fairly and naturally in themselves bear. And it appears to me that if we should construe the leasing power as continuing beyond the duration expressly assigned to the trusts above mentioned, that we should do a violence to the fair and obvious meaning of the terms in which that power is couched. Upon the whole, therefore, we are of opinion, that the trustees took an estate by implication for the lives of the annuitants, with a term of years in remainder for the purpose of raising the sum of 800*l.*; and that after those trusts were (as they appear in evidence to have been) satisfied, the several limitations for life and in tail took effect as legal limitations; and of course that the lessor of the plaintiff, the remainder-man in tail, had such a legal estate in the premises at the time of bringing his ejectment as will enable him to make the demise laid in this declaration.

Rule discharged.

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DIXON and Others, Assignees of BATTIER and Son, Bankrupts, *against* BALDWEN and Another.

Saturday, April 12th.

Where *A.* and *B.*, traders living in *London*, were, in the course of ordering goods of the defendants, cotton manufacturers at *Manchester*, to be sent to *M.* and Co. at *Hull*, for the purpose of being afterwards sent to the correspondents of *A.* and *B.* at *Hamburgh*; and on the 31st of *March A.* and *B.* sent orders to the defendants for certain goods *to be sent to* M. *and Co. at* Hull, *to be shipped for* Hamburgh *as usual*; held that as between buyer and seller the right of the defendants to stop as *in transitu* was at an end when the goods came to the possession of *M.* and Co. at *Hull*; for they were for this purpose the appointed agents of the vendees, and received orders from them as to the ulterior destination of the goods; and the goods, after their arrival at *Hull*, were to receive a new direction from the vendees. But it was competent for *A.* and *B.*, who became insolvent some time in *July*, but committed no act of bankruptcy till the 2[illegible]th of *September*, to agree bonâ fide, and not from motives of voluntary and undue preference, to give up the goods to the defendants in the latter end of *July*. And held that the circumstances of the bankrupts having called a meeting of their creditors, and having taken legal advice, and being encouraged by the result of such meeting and advice to give up the goods, was evidence for the jury to find that the goods were given up bonâ fide, and not from any motive of voluntary and undue preference to the defendants, though done by the bankrupts in a situation of impending bankruptcy at the time; the defendants, at the time of such giving up of the goods by the bankrupts, holding possession of the goods upon a claim of right to stop them in transitu, certain

IN trover for 18 bales of cotton twist, it appeared at the trial before Lord *Ellenborough* C. J. at the last Sittings at *Guildhall* that the goods in question had been furnished by the defendants, cotton dealers at *Manchester*, to the order of the *Battiers*, traders living in *London*, whose course of dealing it was to send orders to the defendants for goods of this description to be forwarded to *Metcalfe* and Co. at *Hull*, for the purpose of being shipped to the correspondents of the *Battiers* at *Hamburgh*, and by those correspondents sent to the persons for whom the goods were intended. When the goods arrived at *Hull*, the *Metcalfes* received orders from the *Battiers* when and to whom to ship the goods at *Hamburgh*. This course of dealing had subsisted between these parties from *January* 1800: and as the *Battiers* received orders from abroad for cotton twist, they gave orders from time to time to the defendants to send the goods to *Metcalfe* and Co. at *Hull*, *to be shipped for* Hamburgh *as usual*. Of this import was the order for some of the goods in question, which was sent by the *Battiers* to the defendants in a letter dated 31st of *March* 1803, in which the goods were directed to be "packed in bales, marked G. S. (and a

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certain mark) for order, *and to be forwarded to Meſſrs.* Metcalfe *and Sons, to be ſhipped for* Hamburgh *as uſual;*" and another order for the remainder of the goods in queſtion, dated 11th of *May* 1803, was couched in ſimilar terms. The goods were accordingly ſent by the defendants to the *Metcalfes* at *Hull*, marked and made up in the manner directed. In the beginning of *July* following the *Battiers* ſtopped payment, of which the defendants being immediately appriſed, one of them proceeded to *Hull*, and ſtopped the goods in the hands of the *Metcalfes* on the 7th of *July*, and ſome time after in the ſame month took poſſeſſion of them, upon giving the *Metcalfes* an indemnity. Four of the bales had been actually ſhipped on board a veſſel about to proceed to *Hamburgh*, but they were afterwards re-landed upon the application of the defendants, and were returned to them with the reſt, which had remained in the warehouſe of the *Metcalfes* from the time of their arrival at *Hull*. One of the *Metcalfes*, who was examined as a witneſs, ſtated that at the time of the ſtoppage of the goods they held them for Meſſrs. *Battier*, and at their diſpoſal; that they accounted with the *Battiers* for the charges of the goods. And the witneſs deſcribed his buſineſs to be merely an *expeditor* agreeable to the directions of the *Battiers; a ſtage*, and *mere inſtrument* between buyer and ſeller. That he had no authority to ſell the goods, and frequently ſhipped them without ſeeing them. That the bales in queſtion were to remain at his warehouſe for the orders of *Battier* and ſon, and he had no other authority than to forward them. That at the time the goods were ſtopped he was waiting for the orders of the *Battiers;* that he had ſhipped the four bales, expecting to receive ſuch orders, and re-landed them becauſe none had arrived. That if the goods had been demanded

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manded by the *Battiers* before ſhipping, he ſhould have delivered them up to them. At the time when the defendants gave notice to the *Metcalfes* to ſtop the goods, they alſo applied to the *Battiers* to order them to be delivered up. The *Battiers* in the mean time called a meeting of their creditors in *London*, and a caſe was laid before counſel concerning their right to reſtore the goods to the defendants; the reſult of which meeting and opinion was ſtated in a letter of the 29th of *July* from the *Battiers* to the defendants, in which they inform them "that "yeſterday a meeting was held of our ſeveral creditors "reſident in *London*, when they unanimouſly reſolved that "it would be moſt for the intereſt of the concerned that "the affairs ſhould be put in truſt, and that the property "ſhould be divided from time to time amongſt the cre- "ditors. The opinion obtained from counſel, and which "we are happy to ſay agreed with our wiſhes, was like- "wiſe ſubmitted to their conſideration; *and it appeared "generally the opinion that the twiſt* (a) *in* Hull *ſhould be "given up.*" There was alſo another letter of the 7th of *September* from the *Battiers* to the defendants, incloſing a ſtatement of their affairs; in which they obſerve, that the defendants' "claim is ſtated according to what we "conceive it to be, *after deduction of the goods ſtopped at* "Hull." The *Battiers* committed no act of bankruptcy till the 26th of *September* 1803, on which act of bankruptcy a commiſſion iſſued on the 1ſt of *October*. The aſſignees afterwards demanded the goods, which the defendants refuſed to deliver up. Two queſtions were made at the trial, 1ſt, Whether the defendants had a right to ſtop the goods as *in tranſitu* at the time they took poſſeſſion of them: or if they had not, 2dly, Whether the

(a) The goods in queſtion.

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Battiers were in a condition to rescind the contract; and if so, whether they had done any act amounting to a rescinding of the contract before their bankruptcy? On the first question Lord *Ellenborough* inclined against the right of stopping in transitu under the circumstances of the case: and upon the other ground, his Lordship left the question to the jury, whether or not the consent of the *Battiers* to the rescinding of the contract and returning the goods, given before the act of bankruptcy, were given bonâ fide, and without any intention of a voluntary and undue preference; which he inclined to think it was; it being after legal advice taken, and upon a conference with their creditors at a public meeting. And the jury found a verdict for the defendants. A rule nisi was obtained on a former day for setting aside the verdict and having a new trial on the grounds, that the transit of the goods was at an end at the time when they were stopped by the defendants, and that nothing afterwards happened which could amount to a rescinding of the contract on the part of the creditors, or of the bankrupts, whose ability to rescind it without the concurrence of the creditors was under the circumstances denied.

Garrow, *Topping*, and *Wood*, shewed cause against the rule. 1st. The Defendants were entitled to stop the goods in transitu in the hands of the *Metcalfes* who were middlemen between the vendors and vendees. *Hull* was not the ultimate place of their destination, but they were ordered to be sent there for the declared purpose of being shipped to *Hamburgh*. The ultimate place of destination then, as between these parties, was *Hamburgh*, and the goods were still in transitu till they got there into the hands of the correspondents of the *Battiers*. The *Met-*

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ealfes were not the exclusive acknowledged agents of the bankrupts, but were middle-men. They described themselves as *expediters*, and a *mere stage*. Their duty was analogous to that of a wharfinger, in whose hands, as in those of a mere carrier, goods may be stopped. *Stokes* v. *La Riviere* (*a*), and *Hunter* and another, assignees of *Blanchard* and *Lewis*, v. *Beal* (*b*), carried the right of stopping in transitu further than this case. In the latter the goods had been sent to the inn in the place where the bankrupts lived, who had given orders to the book-keeper to send them down to the quay in order to have them shipped to be carried to *Boston*; and they were accordingly sent; but being too late for the ship were sent back again to the inn, where they were ordered by the bankrupts' servant to be kept a few days longer till another ship was ready. In that case a new direction had been given to the goods by the bankrupts, and yet the vendor's right to stop in transitu was holden still to continue, and did prevail. But here *Hamburgh* was the known ultimate place of destination in the first instance. The right of stopping in transitu is now become a legal and not a mere equitable right, as it was perhaps at first considered. It was so considered by Lord *Loughborough* in delivering the judgment of the Court of Exchequer Chamber in *Mason* v. *Lickbarrow* (*c*), who refers to Lord *Hardwicke*'s opinion in *Snee* v. *Prescott* (*d*). [*Grose* J. If you refer

(*a*) Sittings after *Michaelmas* 1784, at *Guildhall*, before Lord *Mansfield* C. J. This case was cited from the argument of counsel in *Ellis* v. *Hunt*, 3 *Term Rep.* 466., but Lord *Ellenborough* C. J. observed that there was a more correct note of the case given by Mr. Justice *Lawrence* in delivering the judgment of the Court in *Bohtlingk* v. *Inglis*, 3 *East*, 397.

(*b*) Sittings after *Trin.* 1785, at *Guildhall*, cor. Lord *Mansfield* C. J. cited in 3 *Term Rep.* 466.

(*c*) 1 *H. Blac.* 364, &c. and cases there cited. (*d*) 1 *Atk.* 245.

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further back to the case of *Wiseman* v. *Vandeput* (*a*), you will find that the right of stopping in transitu was originally put upon a ground of equity, which has since grown into law.] It was expressly stated to be a legal right and not merely founded on principles of equity, by Lord *Mansfield* in the case of the assignees of *Burghall* v. *Howard* (*b*), and by the Court of *C. B.* in *Oppenheim* v. *Russel* (*c*). [Lord *Ellenborough* C. J. It must have been considered as a legal right in *Bohtlingk* v. *Inglis*, 3 *East*, 381., for there the consignors maintained trover against the assignees of the consignee upon a mere demand and refusal of the goods by the captain before they were delivered.] The right then, being founded in justice and the common law, ought to be extended as far as it may consistent with the principle on which it is founded, that is, till the goods arrive at their ultimate place of destination, and have been taken possession of by or on the behalf of the vendee or consignee. In *Hodgson* v. *Loy* (*d*), even part payment was deemed not to take away the right of stopping in transitu; and the right being founded in honesty, courts have always leant in support of it. This was a case of dealing for the *export* trade: and all the cases which have been decided against the exercise of the right, have been cases of *inland* dealings. The goods were sent to the *Metcalfes* at *Hull*, merely as a stage on their way to *Hamburgh*. In *Hunt* and others, assignees of *Bennet* and *Heaven*, v. *Ward* (*e*), a delivery of the goods to a packer, even by the order of

(*a*) In 1690, 2 *Vern.* 203.

(*b*) At *Guildhall* Sittings after *Hil.* 32 *G.* 2., cited in 1 *H. Blac.* 365, 6.

(*c*) 3 *Bos. & Pull.* 42. (*d*) 7 *Term Rep.* 440.

(*e*) Which came on upon a motion for a new trial in this court a few years before the case of *Ellis* v. *Hunt*, in 1789, cited in 3 *Term Rep.* 467.

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the vendee, did not conclude the right of the vendor to ſtop them in tranſitu; the packer being conſidered as a middle-man. In *Leeds* v. *Wright* (*a*), where goods ſent from *Mancheſter* on account of a houſe in *Paris* were conſidered as no longer in tranſitu after they were in the hands of the packer in *London*, the vendee's agent alſo lived in *London*, and had an authority to diſpoſe of the goods where he pleaſed, and might have made *London* the place of their ultimate deſtination. It was therefore not merely a conſtructive but an actual delivery. And in *Scott* v. *Pettit* (*b*) the like determination was made on the ground that the conſignee had no other warehouſe than that of his packer, where all goods conſigned to him were lodged, and which was therefore their ultimate place of deſtination.

On the ſecond ground they contended, that it was competent for the vendees, the *Battiers*, at any time before their bankruptcy, to renounce the goods, unleſs it were done with a fraudulent view to give the vendors an undue preference over the reſt of the creditors. This was ſettled in *Alderſon* v. *Temple* (*c*). But the letters negative ſuch a concluſion. For the goods were directed to be reſtored after legal advice taken, and with the general approbation of the meeting of the creditors convened upon the bankrupt's affairs in *London*. Till the act of bankruptcy the trader, though failing, has the legal right to diſpoſe of his property, unleſs it be done with a fraudulent view of preference. The queſtion then always is, *Quo animo* the act was done? If the reſtitution were made bonâ fide, as it appears here, by the conſent of all intereſted whoſe opinions could then be taken, that makes an end of the queſtion. The meeting of the creditors was on the 25th

(*a*) 3 *Boſ. & Pull.* 320. (*b*) *Ib.* 469. (*c*) 4 *Burr.* 2239.

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of *July* 1803, when the queſtion was canvaſſed and counſel's opinion taken; which being favourable to the defendants, the bankrupts wrote on the 29th of *July* to the defendants to inform them that it was conſidered as the general opinion that the goods ſhould be given up to them. Without this aſſurance the defendants might have reſorted to legal proceſs; for the bankruptcy was not till the 26th of *September*. And if the goods had been delivered up in *July* on a threat of legal proceſs, no doubt the delivery would have been legal. *Thompſon* v. *Freeman* (*a*). For even a demand for ſecurity will juſtify the creditor ſo obtaining it. *Smith* v. *Payne* (*b*). On the queſtion of undue preference they alſo referred to *Cock* v. *Goodfellow* (*c*), *Small* v. *Oudley* (*d*), *Harman* v. *Fiſher* (*e*), and *Hartſhorn* v. *Slodden* (*f*); and concluded that at all events it was a queſtion for the jury *quo animo* the goods were returned, which they had decided in affirmance of the act of reſtitution.

Erſkine and *Gibbs*, in ſupport of the rule (*g*), contended, 1ſt, That as between the buyers and ſellers of the goods, who were the *Battiers* on the one hand, and the defendants on the other, the goods had reached the place of their deſtination, and were no longer liable to be ſtopped in tranſitu after they had come to the hands of *Metcalfe* and Son at *Hull*. Their ulterior deſtination from *Hull* depended altogether upon the orders of the *Battiers*, who

(*a*) 1 *Term Rep.* 155.
(*b*) 6 *Term Rep.* 152.
(*c*) 10 *Mod.* 489.
(*d*) 2 *P. Wms.* 427.
(*e*) *Cowp.* 117.
(*f*) 2 *Boſ.* & *Pull.* 582.

(*g*) I was not in court when the caſe was argued by the plaintiffs' counſel; but what follows is ſelected from the arguments urged when the rule niſi was obtained, and from the relation of Gentlemen who were preſent when it was finally heard and determined.

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might have difpofed of them as they thought proper; and the *Metcalfes* held the goods altogether at the difpofal of the *Battiers*, and were waiting their orders when the ftoppage took place. This cafe, therefore, comes within the fame principle as thofe mentioned where the tranfitus was deemed to be at an end. And if it were not fo, then there would be two fets of perfons who would have the right of ftopping the goods in tranfitu in their progrefs from *Hull* to *Hamburgh*, namely, the original vendors, and the *Battiers*, who would become vendors with refpect to their own correfpondents abroad; but it has never yet been confidered that the right of ftopping goods in tranfitu can be exercifed by two different fets of perfons at the fame time. 2dly, They contended that the bankrupts had no authority to refcind the contract after having declared their infolvency and called a meeting of their creditors: but even if they had had fuch a power, they had not in fact refcinded the contract; but only informed the defendants of what they fuppofed the creditors meant to do: and that the ftoppage of the goods by the defendants was not in confequence of the letter of the bankrupts on the 29th of *July*; but had taken place long before, upon an indemnity given by the defendants to the *Metcalfes*, and founded on an affumption of their right as vendors to ftop them as ftill in tranfitu.

Lord ELLENBOROUGH C. J. There are two queftions in this cafe; the firft, whether a right to ftop as *in tranfitu* exifted in the defendants, the fellers of thefe goods, on the *7th of* July, when they were ftopped in the hands of *Metcalfe* at *Hull*: the fecond, whether fuppofing fuch right not to have exifted in them at the time of fuch ftopping, the confent to their retaining thefe goods, which

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was afterwards given by the *Battiers*, were, under all the circumstances, a valid and effectual consent, or whether it be impeachable on the ground of its being a voluntary preference in contemplation of their then impending and probable bankruptcy; on which ground alone it has been sought to be impeached both at the trial and upon the rule now pending. The strongest cases cited by the defendants' counsel in favour of their right to stop in transitu, are the cases of *Hunter* v. *Beale*, cited in *Ellis* v. *Hunt*, 3 *T. R.* 467., and *Stokes* v. *La Riviere*, cited in *Bohtlingk* v. *Inglis*, 3 *East*, 381. As to the first of these cases, *Hunter* v. *Beale*, in which it is said that the *goods* must come to the *corporal touch of the vendees*, in order to oust the right of stopping in transitu, it is a *figurative* expression, rarely, if ever, strictly true. If it be predicated of the vendee's own actual *touch*, or of the touch of any other person, it comes in each instance to a question, whether the party to whose touch it actually comes be an agent so far representing the principal, as to make a delivery to him a full, effectual, and final delivery to the principal, as contradistinguished from a delivery to a person virtually acting as a carrier or mean of conveyance to or on the account of the principal, in a mere course of transit towards him. In *Hunter* v. *Beale*, Sittings after *Trin.* 1785 before Lord *Mansfield*, I cannot but consider the transit as having been once completely at an end in the direct course of the goods to the vendee, i. e. when they had arrived at the innkeepers, and were afterwards, under the immediate orders of the vendee, thence actually launched again in a course of conveyance *from him*, in their way to *Boston*; being in a new direction prescribed and communicated by himself. And if the transit be once at an end, the delivery is complete, and the transitus for this purpose

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cannot commence de novo merely becaufe the goods are again fent upon their travels towards a new and *ulterior deftination*. As to the cafe of *Stokes* v. *La Riviere and Lawley*, the goods were claimed in fuit by the plaintiff the feller, from the defendants, to whom the goods were delivered to be forwarded to their (i. e. defendants) correfpondents *Meffrs. Duhems of Lifle*: the *Duhems* were therefore the confignees, and *Lifle* the ultimate place of deftination. Upon the infolvency of the *Duhems*, *La Riviere* and *Lawley*, the defendants, withdrew the goods from the hands of *Bine*, *Overman*, and Co. of *Oftend*, to whom they had fent them in a courfe of conveyance towards and for the *Duhems* at *Lifle*. *La Riviere* and Co. infifted, as againft the plaintiffs, that upon the delivery of the goods to them for the *Duhems*, the property was vefted in the *Duhems*, in *whofe right* (but for their own benefit in account with the *Duhems*) they claimed to detain the goods. This however, in refpect of the *Duhems*, on whofe right the defendants ftood, was clearly a cafe of tranfit not finifhed at the time of the claim made. The cafe of *Hodgson* v. *Loy* was alfo a clear cafe of tranfit uncompleted; for the butter, purchafed in *Cumberland*, was proceeding through different ftages of county conveyance to *E. Ward*, the purchafer in *London*; but before it reached the place of its deftination, it was ftopped: and the only very material queftion in that cafe was, whether a *part payment* by the purchafer took the cafe out of the common rule, and oufted the feller's otherwife unqueftionable right to ftop in tranfitu? The late cafes which have been cited of *Leeds and another* v. *Wright* (*a*), and *Scott and others affignees* v. *Pettit* (*b*), are authorities to the fame effect. In the former the tranfitus was holden to be at an

(*a*) 3 *Bof. & Pull* 320. (*b*) *Ib.* 469.

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end when the goods had reached the defendant, who was the packer of one *Morfferon*, a general agent of *Le Grahd* and Co. at *Paris*, and who had a general power of difpofal in refpect to them, and might have fent the goods either to his principals at *Paris*, or to *Holland*, *Germany*, or fuch other market as he fhould think beft. And the latter cafe, fimilar in many circumftances to the former, was decided on the fame ground, viz. that the tranfitus of goods is only not at an end upon their reaching the packer, where they remain with him for the purpofe of being forwarded on to fome ulterior appointed place of deftination. But here, as in thofe cafes, the goods had fo far gotten to the end of their journey, that they waited for new orders from the purchafer to put them again in motion, to communicate to them another fubftantive deftination, and that without fuch orders they would continue ftationary. As to the fecond queftion, I continue to think as I thought at the trial, that the bankrupts were competent to refcind, and had in fact refcinded, the contract for the fale of thefe goods. The circumftances of deliberation, confent of creditors, advice of counfel, and the publicity which attended the whole of the meafure, exempted it from being properly confidered as a fraudulent preference in contemplation of bankruptcy. That the *Battiers* muft have confidered themfelves in a ftate of infolvency and impending bankruptcy at the time, cannot be doubted; but until an act of bankruptcy the jus difponendi over goods remains by law with the trader, unlefs he exercife it by way of a voluntary and fraudulent preference of a particular creditor in contemplation of bankruptcy. But here the goods were given up, if not from a threat of litigation, at leaft under an idea of the right being probably adverfe to the claim of the bankrupts and their creditors. And volun-

tary favour towards the defendants did not operate as any inducement with the bankrupts to recede from their rights on this occafion. The queftion whether under all the circumftances they acted bonâ fide in giving up the goods, or from a motive of voluntary and undue preference to the defendants, was left to the jury, who by their verdict have affirmed that the bankrupts acted bonâ fide, and have negatived any voluntary preference.

GROSE J. was of opinion, on the firft point, that the right to ftop in tranfitu was not at an end when the defendants took poffeffion of the goods. But if it were, he thought on the fecond point, that the queftion had been properly left to the jury, who had found that this was not a voluntary preference.

LAWRENCE J. agreed with Lord *Ellenborough* on the firft point, that the goods had before their ftoppage by the defendants arrived at their ultimate place of deftination as between thefe parties, and confequently that they had no right to ftop them as in tranfitu. But on the fecond point, that the letter of the 29th of *July* was no recognition on the part of the bankrupts of the act of the defendants in ftopping the goods, nor an agreement to refcind the contract. On the contrary, it imported that they did not chufe to do any thing without the approbation of the creditors at large. The object of that letter was to give the defendants information that the creditors in *London* had met, and that the creditors who attended that meeting feemed difpofed to give up the goods; but not taking upon themfelves (the *Battiers*) the difpofition of them; but referring every thing to the creditors. And there was no affent of the creditors to the ftoppage by the defendants.

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LE BLANC J. agreed that the tranfit of the goods was at an end before they were ftopped by the defendants. As between the buyer and feller they were arrived at the place of their deftination when they got to the poffeffion of the *Metcalfes* at *Hull*; for till the *Metcalfes* received directions from the *Battiers* they did not know where to fend the goods. The warehoufe of the *Metcalfes* at *Hull* muft therefore be confidered as the warehoufe of the *Battiers*. With refpect to the cafe of *Hunter* v. *Beale*, he obferved that the merchants there (the vendees) having given the goods a different direction after they got to the inn, and before they were ftopped, he fhould have thought that the tranfit was at an end. Upon the fecond point, whether the goods were bonâ fide delivered up to the defendants, he thought it a point of confiderable difficulty on the evidence as it appeared before the Court. The letter of the 29th of *July* referred to fome antecedent correfpondence, and to fome legal opinion which had been taken; fuch prior letter might have contained a propofal or demand by the defendants to the *Battiers* to give up the goods; and if fo, their anfwer might be evidence of their agreeing to renounce them; but the evidence was very flight. If that letter meant merely to declare the fenfe of the greater part of the creditors in *London*, it would be going too far to fay that it amounted to an abfolute affent to the defendants taking back the goods. The evidence, however, though flight, was fit for the confideration of the jury, and they have found for the defendants.

Rule difcharged.

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Friday, May 11th.

Where parties by an indorsement in general terms on the bonds of submission to arbitration agree that the time for making the award shall be enlarged, such agreement virtually includes all the terms of the original submission to which it has reference, amongst others that the submission for such enlarged time shall be made a rule of Court: and consequently the party is liable to an attachment for non-performance of an award made within such enlarged time, under the stat. 9 & 10 *W.* 3. *c.* 15.

THE parties, by their respective bonds of submission, dated 20th of *August* 1803, bound themselves to submit certain matters in difference to the arbitration of *A.* and *B.* And if they did not make their award on or before the 21st of *September* then next, then to the umpirage of *C.* so as he made his umpirage on or before the 24th of *September* 1803. By a memorandum on the bonds dated 21st of *September*, it was thereby agreed between the said parties, that the said arbitrators making their award should be extended from that day unto the the 24th of *September* aforesaid, and for making the umpirage to the 1st of *October*: and by another indorsement on the bonds signed by the parties on the 28th of *September*, the time for making the umpirage was further extended to the 6th of *October*, which indorsement was stamped with an agreement stamp. By an umpirage made on the 5th of *October*, *Thomson* was directed to pay 986*l.* 11*s.* 2*d.* to *Evans* by two instalments, one on the 4th of *November* last, the other on the 6th of *January* 1804. *In the bonds of submission it was provided that the bonds and submission thereby made, should be made a rule of Court pursuant to the statute, if either of the parties should require the same and the Court should so please.* But when the time for making the award was agreed to be *enlarged* by the indorsement on the bonds before-mentioned, *it was not added that that should be made a rule of Court.* By a rule of Court made on *Saturday* next after the octave of *St. Martin* in *Michaelmas* Term last, reciting the bonds of submission, and that the submission was agreed to be made a rule of Court,

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Court, and that the parties had afterwards, by the said indorsements, agreed to enlarge the time in the manner before-mentioned, it was ordered that such the presents and submission made in manner aforesaid be made a rule of Court. The umpirage having been made within the enlarged time, and the defendant not having performed what he was therein directed to do, an attachment was moved for against him. Whereupon a rule was obtained calling on the plaintiff to shew cause why the last-mentioned rule of *Michaelmas* Term for making the submission, &c. for such enlarged time a rule of Court should not be amended by confining such rule to the submission made by the bond and condition therein recited, and excluding the two subsequent indorsements of the 21st and 28th of *September* for enlarging the time, &c.

This rule was obtained on the authority of *Jenkins* v. *Law* (a), where it was determined, that an agreement to enlarge the time for making an award must contain a new consent that it shall be made a rule of Court, otherwise no award made within such enlarged time can be enforced by attachment.

Wood and *Wetherell* shewed cause against the rule, and denied the authority of the above-mentioned case, which they said passed without observation; and that it was plainly the intention of parties to an arbitration, who agreed by an indorsement upon the submission bonds to enlarge the time for making the award, to include all the terms of the original submission, one of which was, that it should be made a rule of Court. That without reference to the contents of the submission bonds, such indorsement was not intelligible; and if reference were

(a) 8 *Term Rep.* 87.

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neceſſarily made to any part of the contents, it muſt in reaſon be made to the whole of them.

Erſkine and *Marryat*, in ſupport of the rule, inſiſted on the authority of the caſe of *Jenkins* v. *Law*, which was grounded on the act of 9 and 10 *W*. 3. *c*. 15. which enables litigant parties "to agree that their ſubmiſſion of "their ſuit to the award, &c. ſhall be made a rule of "Court, and *to inſert ſuch agreement* in their ſubmiſſion, "or *the condition of the bond or promiſe* whereby they oblige "themſelves reſpectively to ſubmit to the award, &c. "which agreement being ſo made, *and inſerted in their* "*ſubmiſſion or promiſe, or condition of their reſpective bonds*, "ſhall on affidavit, &c., be entered of record in ſuch "Court, and a rule thereupon made, &c., *purſuant to* "*ſuch ſubmiſſion*, &c." and then it provides that the party neglecting to obey the award, ſhall be ſubject to all the penalties of contemning a rule of Court. To give the Court juriſdiction therefore, the agreement to make the ſubmiſſion to arbitration a rule of Court, muſt, by the expreſs words of the act, be inſerted in the condition of the bond or promiſe. It was ſo inſerted in the bond; but that by the lapſe of time became functus officio, and then the agreement was made, which does not expreſs that the agreement ſhall be made a rule of Court, but merely that the time ſhall be enlarged. That agreement is diſtinct from the bond, and cannot be incorporated into it; for no action would now lie on the bond (*a*), but it muſt be brought on the agreement; and the inſtruments are ſo far diſtinct, though on the ſame piece of paper, that they required and actually have different

(*a*) *Brown* v *Goodman*, *E*. 29 *G* 3 *B*. *R*. cited in *Lit'ler* v. *Holland*, 3 *Term Rep* 592.

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stamps. It was certainly competent to the parties to agree to enlarge the time without agreeing to have their submission again made a rule of Court. Then having mentioned the one and not the other, there is no reason for extending their agreement by implication.

Lord ELLENBOROUGH J. C. said it was a case of considerable consequence, affecting the practice of all the Courts, upon the construction of a very beneficial act of parliament; and therefore, before the Court gave their final opinion they would consult with the other Judges: though, as at present advised, it appeared to him that the memoranda endorsed on the submission-bond for enlarging the time did, by necessary construction, virtually incorporate all the conditions in the bond to which they had reference. That they must be taken to do so to a certain extent was apparent; for in themselves the memoranda did not even specify the names of the arbitrators or umpire, nor the subject-matter of the reference; and if any part were adopted, he could not see what line could be drawn, and why the whole must not be adopted.

Cur. adv. vult.

His Lordship now delivered the opinion of the Court.

This matter came on before the Court in the beginning of this term, upon a rule to shew cause why a rule made in last *Michaelmas* term should not be amended by confining such rule to the submission made by the bond and condition therein recited, and excluding the two subsequent memorandums or indorsements, bearing date the 21st and 28th of *September* last, &c. By the condition of the arbitration-bond the arbitrators were to make their award

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on or before the 21st of *September* last, and the umpire to make his umpirage on or before the 24th of the same month. On the 21st of *September* the parties agreed that the time for the arbitrators making their award should be enlarged to the 24th of *September*. And on the 28th of *September* they agreed that the time for the umpirage should be extended to the 1st of *October*. The umpirage was made within the time to which by this agreement the authority of the umpire was extended, and the agreement to enlarge was made a rule of Court. It was objected on the part of the defendant that the award of the umpire was not capable in this case of being enforced as a rule of Court, on the authority of the case of *Jenkins* v. *Law*, 8 *Term R.* 87.; the agreement to enlarge the time of making the award containing no express consent that such agreement should be made a rule of Court. But, upon considering that case, in which the objection appears to have been given way to without any argument on the part of the counsel who had obtained the rule for an attachment, and on which account the matter was probably not brought under the immediate view and attention of the Court; and upon conferring, with a view to an uniformity of practice on this subject, with most of the Judges of the other Courts of *Westminster Hall*, we are of opinion that the case referred to cannot be supported; and that the agreement to enlarge the time for making the award must be understood as by reference virtually incorporating in itself all the antecedent agreements between the parties relative to that subject, as if the same had been formally set forth and repeated therein, and of course incorporating, amongst the rest, the agreement contained in the condition of the bond, that the submission to arbitration should be made a rule of Court; and that, with reference

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to the enlarged time, instead of the time originally specified in the condition of the bond.

Rule discharged. And Rule for Attachment absolute.

Friday, May 11th.

Sandby, Clerk, *against* Miller.

The *London* Court of Requests have jurisdiction, by the stat. 39 & 40 *Geo.* 3. *c.* 104. over a contract for the retention of tithes by the tenant, the value of which was under 5*l.*; and therefore if the vicar sue for the same and recover less than 5*l.* upon a count in assumpsit for a quantum valebant, the defendant may enter a suggestion on the roll, stating that he was a freeman and inhabitant of the city of *London*, trading there at the time he was served with the writ, for the purpose of ousting the plaintiff of his costs under the 12th section of the act.

The plaintiff brought assumpsit to recover the value of tithes due to him, as vicar of *St. Giles*, *Camberwell*, from the defendant, who occupied certain tenements within the vicarage, and for which he had for two years before paid a composition at so much an acre: but latterly the number of acres being in dispute, the defendant refused to pay the sum demanded by the vicar, who thereupon brought this action at the Sittings at *Westminster*, before Lord *Ellenborough* C. J., when he recovered a verdict for 7*s.* 6*d.* upon a count for a quantum valebant (*a*), which, together with 2*l.* 14*s.* 3*d.* paid into court, constituted the original amount of the plaintiff's demand, as appeared by an account delivered by him to the defendant before the action brought, and also by a bill of particulars obtained afterwards. It appeared that the plaintiff did not reside within the jurisdiction of the Court of Requests in the City of *London*, but that the defendant, though he resided at times at his house at *Peckham Rye*, in *Surry*, yet also kept a shop and carried on trade within the city. The defendant, in the last Term, upon an affidavit that he was a freeman and inhabitant within the city of *London* at the time when the action was brought, and that he was served with the writ within the city, obtained a rule *nisi* for leave to enter a suggestion on the roll under the stat. 39 & 40 *Geo.* 3.

(*a*) The first count of the declaration was on a composition for tithe.

c. 104.

c. 104. (local acts), "for extending the powers of the "Court of Requests in the city of *London*," that the original cause of action did not exceed 5*l.* and that the same was recoverable in the said Court of Requests. The 12th section of the act enacts, "that if any action or "suit shall be commenced in any other court than the "said Court of Requests for any debt not exceeding 5*l.* "and recoverable by virtue of the recited acts (3 *Jac.* 1. "*c.* 15. and 14 *Geo.* 2. *c.* 10.), and of this act or any of "them in the said Court of Requests, in every such case "the plaintiff in such action or suit shall not, by reason "of a verdict for him, or otherwise, have or be entitled "to any costs whatsoever." The 11th section provides, "that this act or any thing herein contained shall not "extend to any debt where any title of freehold, &c. "shall come in question, or to any debt by specialty, "&c. nor to any other debt that shall arise by reason "of any cause concerning testament or matrimony, *or* "*any thing concerning or properly belonging to the ecclesiasti-* "*cal court*, albeit the same respectively shall not exceed "5*l.*" &c.

Wigley shewed cause, and relied principally on the ground that this, being a demand in respect of tithe, came within the exception of the 11th section as "*a thing concerning or properly belonging to the ecclesiastical court*," and therefore not within the jurisdiction of the Court of Requests. It is enough under these words that the *subject matter* of the action is one that *concerns* or *properly belongs to* the ecclesiastical court; it is not necessary that the suit or action should specifically and in form be brought for the thing. Now here the action is in substance for the *single value of the tithe*, the jurisdiction of which properly

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belongs to that court. The verdict was taken upon a count upon an implied assumpsit for the value of the tithe, estimated indeed by the rate of the former composition, which was then in dispute; considering it as an agreement by the vicar to let the defendant have the tithe, without specifying at what value. The title to the tithe and freehold might have come in question in such an action; which would be enough to oust the jurisdiction of the Court of Requests, according to *Woolley* v. *Cloutman* (a), though the action there was on an implied assumpsit for use and occupation.

Marryat, in support of the rule, said, that it was clear from the bill of particulars, that the original demand was under 5 *l.*, and that jurisdiction was given to the *London* Court of Requests over all causes not particularly excepted. That the title to the freehold could not have come in question; for unless a *contract* had been proved, the value of the tithe could not have been recovered in assumpsit. Then the action cannot be said to have been brought for any thing which *concerned or properly belonged to* the ecclesiastical court; for the plaintiff could not have sued there on this contract.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered the opinion of the Court. This was a motion for leave to enter a suggestion on the roll to exclude the plaintiff, (who had obtained a verdict in an action in this court, establishing on his part an original demand of less than 5*l.*, and reduced by a tender to 7*s.* 6*d.*) from his costs, under stat. 39 & 40 *Geo.* 3. *c.* 104. on the ground of the defend-

(a) *Dougl.* 244.

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ant's being reſident and liable to be ſummoned within the juriſdiction of the Court of Requeſts for the city of *London*; and that the original debt ſued for did not exceed the ſum of 5*l.* The count in aſſumpſit upon which the queſtion ariſes was upon a quantum valebant, for the value of tithes due to the plaintiff, as vicar of *St. Giles, Camberwell*, from certain tenements in the occupation of the defendant, and alleged to have been taken and retained by and at the requeſt of the defendant. The plaintiff reſiſted the motion for leave to enter this ſuggeſtion, upon the ground of the following proviſo contained in the 11th ſect. of the act; viz. "that this act ſhould not extend to any debt "that ſhould ariſe by reaſon of any cauſe concerning "teſtament or matrimony, *or any thing concerning or pro-* "*perly belonging to the eccleſiaſtical court*; albeit the ſame "ſhall not exceed 5*l.*;" conceiving that the ſubject matter of this action was "a thing *concerning or properly* "*belonging to the eccleſiaſtical court.*" But we are of opinion that the ſubject of this action, being the recovery upon a promiſe of an equivalent for tithes retained, is not a thing which can properly be ſaid in its nature *to concern the eccleſiaſtical court* itſelf, in reſpect of the general rights, functions, or ſubjects of juriſdiction of that court, nor a thing which can be ſaid properly to *belong* to it; being neither more nor leſs than a civil contract collateral to the right of tithes, (which the count aſſumes to be admitted,) ſuable properly and peculiarly in a court of law, and which has no further connection with the eccleſiaſtical court than as the general object of ſuit, viz. "*tithes*," is in certain caſes a matter properly cognizable in that court, as it alſo is in other caſes properly cognizable in the courts of law: it cannot therefore be ſaid ſo far "*properly* "*to belong to the eccleſiaſtical court*" as to ouſt the juriſdic-

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tion of the *London* Court of Requests in sums not exceeding 5*l.* within the meaning of that proviso; and particularly in a case, as here, where no right to tithes comes in question. We are therefore of opinion, that as the action in this case should have been brought in the Court of Requests, the defendant is entitled to make his rule absolute for entering this suggestion upon the roll.

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Under a devise "to *A.* for life, "and after him "to his eldest or "any other son "after him, for "life, and after "them to as "many of his "descendants "issue male as "shall be heirs "of his or their bodies, down "to the 10th generation "during their "natural lives;" held that *A.* took no more than a life estate; for here is no *general* intent to create an estate tail, as contradistinguished from the particular intent to give an estate for life to the first taker; but a single intent to create a succession of life estates to persons not in esse, which the law will not allow.

THIS was an action against the defendant, an auctioneer, employed by the assignees of *Thomas Southcomb*, a bankrupt, in the sale of an estate of the bankrupt by auction, to recover 130*l.*, the deposit money paid by the plaintiff, who was the highest bidder at such auction, with interest and costs. The defendant at the time of the sale entered into the following undertaking in writing at the foot of the conditions of sale: "If the title is not "satisfactory, the deposit, interest, and costs to be re- "turned by *John Willock.*" The declaration contained a special count upon this undertaking, and the common counts for money paid, had and received, and on an account stated; to which there was a plea of the general issue. The cause was tried at *Exeter* summer assizes 1803, before Lord *Alvanley* C. J., when a verdict was found for the plaintiff with damages 200*l.*, subject to the opinion of the Court on the following case:

On the 23d of *March* 1753, *Lewis Southcomb*, clerk, being seised in fee of the remainder of the estate in question after the determination of the life-estate of *George Portbury*, in his will of this date duly executed and attested, devised as follows: "To my son *John* I leave the entire

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entire guardianſhip of *Thomas*, the ſon of my ſon *Thomas Southcomb*, and alſo of my grand-daughter *Elizabeth* his ſiſter. To him the ſaid *Thomas* (*a*) I do give my eſtate of *Holcomb Burnel* (being the eſtate in queſtion) during his natural life, as ſoon as it ſhall fall (*b*); but to his truſtee in his behalf ſhall be committed *the profits* of the ſaid eſtate *until he ſhall arrive at the age of* 21 *years*; and *after him* I do give it *to his eldeſt or any other ſon after him, during his natural life*, and *after them to as many of his deſcendants iſſue male as ſhall be heirs of* HIS *or* THEIR *bodies down to the tenth generation during their natural lives.*" The deviſor died at the end of 1753 or beginning of 1754, leaving his grandſon, the deviſee, his heir at law. *George Portbury* the tenant for life died in 1763; and upon his death the deviſee *Thomas Southcomb* entered into the poſſeſſion of the eſtate, and continued in ſuch poſſeſſion until his bankruptcy as hereinafter mentioned. On the 28th of *November* 1798 a commiſſion of bankrupt iſſued againſt the ſaid *Thomas Southcomb*, who was a trader, was indebted to the petitioning creditor in a ſum ſufficient to ſupport the commiſſion, and had committed an act of bankruptcy; in conſequence of which he was duly declared a bankrupt; and on the 6th of *November* 1802 a bargain and ſale of his real eſtate was duly made to *Jackſon* and *Chamber*, who had been duly choſen aſſignees of his eſtate and effects. On the 9th of *November* 1802 the defendant, by the direction of the aſſignees, put the eſtate up to ſale by auction; and by the conditions the purchaſer was to pay down a depoſit of 10*l.* per cent. and the reſidue on or before *Lady-day* 1803, on having a good title: the conveyance to be at his own expence. The plaintiff was

(*a*) *i. e.* his grandſon *Thomas*.

(*b*) *i. e.* upon the death of *Geo. Portbury*.

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the higheſt bidder, and paid the depoſit; but on the abſtract being delivered, in which it did not appear that the bankrupt was the heir at law of *Lewis Southcomb*, nor was any document ſtated to prove the death of *Geo. Portbury*, which it was inſiſted on by the aſſignees muſt, from the length of time in which he had been ſhewn to be in exiſtence, be preſumed, refuſed to complete the purchaſe; alleging that a good title could not be made; and inſiſted upon a return of the depoſit, &c. on that ground. The bankrupt who, as is before ſtated, was the heir at law of *Lewis Southcomb*, has no children, and is willing to join the aſſignees in any act that ſhall be thought neceſſary to make a good title and conveyance; but neither of theſe circumſtances was ſtated in the abſtract, or communicated to the plaintiff or his attorney until a fortnight before the aſſizes. The queſtion for the opinion of the Court was, whether the plaintiff were entitled to recover: if the Court ſhould be of opinion that he was, the verdict was to ſtand; if not, the verdict was to be entered for the defendant.

Courtenay, for the plaintiff, after premiſing that in the deciſion of this queſtion the Court would look to no other facts than what were contained in the abſtract of the title delivered to the plaintiff by the vendor, or ſuch at leaſt as were made known to the plaintiff before the action brought; ſtated the queſtion ariſing on the words of the will to be, Whether the deviſee *Thomas Southcomb*, ſince become bankrupt, took an eſtate for life or in tail? (If in tail, he admitted that the bargain and ſale of the commiſſioners would paſs a title to the aſſignees: but not if for life; for the bargain would only operate to paſs that eſtate which the bankrupt lawfully might, and not that which could

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could only be perfected by operating as a forfeiture of his estate (*a*).) It is clear, that the testator only meant that *Thomas Southcomb* should take an estate for life. But it will be argued, that as the general intent of the testator was, that all the male descendants of *T. S.* should take down to the tenth generation, that can only be effectuated by giving an estate in tail male to the first taker: but this would be doing violence to the words as well as to the intent of the will; for the estate is given after him, not to his issue, but to his eldest and any other *son*; which is a word of purchase and not of limitation: and when the testator has expressly declared that such eldest or other son of *T. S.* should only take for life, it would be a forced construction to imply from thence a general intent that even the first taker should have a greater estate. The only words of limitation afterwards used, viz. *his* descendants *issue male* as shall be *heirs* of *his* or *their bodies*, from whence any intention to create an estate tail can be implied, must refer to the *eldest* or *other son* of *T. S.* And the general intent may be effectuated as far as by law it may, by giving an estate for life to the first taker, with successive remainders in tail to his eldest and other sons as purchasers. And he referred to *Archer*'s case (*b*), *Wyld*'s *case* (*c*), *Ginger* v. *White* (*d*), *Goodtitle* v. *Woodhull* (*e*), and *Somerville* v. *Lethbridge* (*f*), the last of which came nearest to the present case, to shew that *T. S.* took only an estate for life.

Gaselee, contrà, said that this was now only a question of costs; as it was clear that the bankrupt being heir at law of the testator, a good title might be made, and that

(*a*) Vide 4 *Leon.* 124. (*b*) 1 *Rep.* 66. (*c*) 6 *Rep.* 16. *b.*
(*d*) *Willes' Rep.* 348. (*e*) *Ib.* 592. (*f*) 6 *Term Rep.* 213.

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equity would compel a ſpecific performance. And that as by the terms of ſale the conveyance was to be made at the expence of the purchaſer, no action lay to recover the depoſit money till tender of ſuch conveyance to the vendor, and his refuſal or inability to execute it: though the vendee might have his remedy in damages for not having the title made to him in due time. [Lord *Ellenborough* C. J. If the title ſhewn be not ſatisfactory, it certainly was not neceſſary for the vendee to do a nugatory act in preparing a conveyance. And the parties could not mean the *latent* title of the vendor, but the apparent title which he exhibited, and upon which only the vendee was required to act.] Then the only queſtion is, whether the vendor had a good title: and that will depend on whether the bankrupt took an eſtate tail under the will: for if he were only tenant for life, the conveyance by bargain and ſale was certainly not ſufficient to enable the aſſignees to convey in purſuance of the agreement. If indeed there had been no bankruptcy, and the bargain and ſale had been made by the bankrupt himſelf, that would have been a forfeiture of his life eſtate, and let in his remainder in fee before the exiſtence of the next taker; but ſuch a conveyance by the commiſſioners to the aſſignees, to which the bankrupt was no party, certainly could not operate as ſuch a forfeiture of his eſtate. The bankrupt however took an eſtate tail. Moſt of the caſes cited were prior to *Robinſon* v. *Robinſon* (*a*), where under a deviſe to *Lancelot Hicks for life and no longer*, he taking the name of *Robinſon*, and after his deceaſe to ſuch *ſon* as he ſhall have taking the name of *Robinſon*, and *for default of ſuch iſſue* then over in fee; *Lancelot Hicks* was holden to take an eſtate tail by implication, notwithſtanding the eſtate for life before expreſsly given to him, in order to

(*a*) 1 *Burr.* 38. and 2 *Veſ.* 225.

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effectuate the manifest general intent of the testator, that the estate should not go over till failure of the issue male of *L. H.* In *Somerville* v. *Lethbridge* (a) the limitations were not for lives, but for terms of 99 years determinable on lives; there therefore could be no question of an estate tail. It is material to consider that this was a reversion to be disposed of; and if it were to be considered that the first taker took only an estate for life, if he died in the lifetime of *G. Portbury*, the devises over would have failed. For "after *him*" in the first place must mean *after the bankrupt*, "I do give it to *his* (meaning the bankrupt's) eldest son, or any *other* son *after him*," (must mean any other son *of the bankrupt after the eldest son.*) "And after *them*" must refer to all the antecedent lives named, viz. the bankrupt, his eldest, or any other son; "to as many of his (i. e. the bankrupt's) *descendants' issue male* as shall be *heirs* of his (the bankrupt's) *or their* (any of his *descendants'*) bodies; down to the tenth generation during their natural lives." The *general* intent therefore was, that *all* the descendants, *issue male*, of the bankrupt should inherit in succession down to the tenth generation, (which must mean from the father, and is only another expression for perpetuity;) though the *particular* intention was to give them only estates for lives: the only way therefore in which the general intent can legally be effected is by giving the bankrupt an estate tail. For if he only took an estate for life, and the words, "issue male as shall be heirs of *his* or their bodies," are to be referred to the issue male of the eldest son, then if the eldest son took an estate of inheritance as a purchaser after the bankrupt's death, which descended to his issue, the other sons of the bankrupt, who could only take if at all next *after* such eldest son, (after *him*) would be excluded.

(a) 6 *Term Rep.* 213.

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Courtenay in reply ſaid, that the defendant's conſtruction rejected the words "*or their bodies*," (his or their bodies) which referred to the eldeſt and other ſons, and read the words "*his body*." And it alſo rejected all the words limiting the eſtates *for the lives* of the ſeveral takers. That if the general intent were to keep the eſtate as long in the family as by law it might, that would better be effected by giving the bankrupt an eſtate for life only, with eſtates tail to his eldeſt and other ſons in ſucceſſion, than by giving him an eſtate tail, which he could immediately defeat.

The Court ſaid, that there could be no doubt that the particular intent was only to give the bankrupt an eſtate for life; and that there could be no difficulty in the conſtruction of the words, unleſs they were to be extended by the ſuppoſed general intent to give him a greater eſtate. They would therefore look into the caſes with that view. And now

Lord ELLENBOROUGH C. J. delivered the judgment of the Court.

On the argument of this caſe it has been contended, on the part of the plaintiff, that the bankrupt, *Thomas Southcomb*, did not take an eſtate tail, but only an eſtate for life under the will of his grandfather *Lewis Southcomb*, clerk, ſtated in the caſe. The clauſe of the will on which the queſtion ariſes is ſhortly and in ſubſtance as follows: "To him the ſaid *Thomas*, ſon of my ſon *Thomas Southcomb*, I do give my eſtate of *Holcomb Burnel* "(the eſtate in queſtion), during his natural life, as ſoon "as it ſhall fall; and *after him*, I do give it to his eldeſt "or any other ſon after him, during his natural life; and "after them, to as many of his *deſcendants* iſſue male as "ſhall be heirs of his or their bodies, down to the 10th

"genera-

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" generation, during their natural lives." In order to give *Thomas Southcomb*, the devisee, an estate tail under this devise, the counsel for the defendant has contended, that the general intent of the testator requires such construction, which must therefore be adopted, though contrary to the particular intent, which is to give only an estate for life. And that such was the general intent of the testator he argues from this, that the testator has given the estate to the eldest or any other son of his grandson; and after them, to as many of his descendants issue-male as shall be heirs of his or their bodies; *thereby meaning that all the sons and their issue should take in succession*; whereas if *Thomas Southcomb*, the first taker, shall take only an estate for life, all his sons, except one, and the issue of all such sons would be excluded. But I do not find any such general intent apparent on this will: on the contrary, the testator has expressly guarded against any implication of such intention, by adding a limitation for life to every subsequent estate. His meaning clearly was to give estates for life only to his grandson, and after him to his sons, and after them to their sons down to the 10th generation; for he has added the words, " during his or their natural lives," to each limitation. But this he could not do by law, inasmuch as the law will not allow of a *successive* limitation of estates for life to persons unborn. Can we then make another will for the testator giving to his devisees different estates than those he meant to give to them, because the estates he intended cannot by the rules of law take effect? This I conceive would be assuming a power which does not belong to us, of turning a legal devise into an executory trust. This devise may be read two different ways, according as the expression " *his* descendants" be referred to the descendants

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ants of *him*, *Thomas Southcomb*, the firſt taker; or to the deſcendants of his eldeſt or other ſon. Reading it in the way moſt advantageous to the defendant's arguments, it would run thus: "To *Thomas Southcomb* for life, and after him to his eldeſt or any other ſon for life, and after them to as many of *his* (*Thomas Southcomb*'s) deſcendants iſſue male as ſhall be heirs of his (*Thomas Southcomb*'s) or their (his eldeſt or other ſon's) bodies down to the 10th generation, for life." And ſo reading it, we find no words ſhewing a general intent to give an eſtate-tail in contradiction to the expreſs eſtates for life, ſo preciſely given to each deſcription of perſons who are to take under the will. In *Robinſon* v. *Robinſon*, 1 *Burr*. 38., the deviſe was to *Launcelot Hicks* for life, and no longer; and after his deceaſe to ſuch ſon as he ſhall have; *and for default of ſuch iſſue*, then to the teſtator's couſin in fee. And the Court held that *Launcelot Hicks*, by neceſſary implication, to effectuate the manifeſt general intent of the teſtator, muſt be conſtrued to take an eſtate in tail male. There an eſtate to the heirs male of the body of *Launcelot Hicks* is implied, though an eſtate for life only be given to him; becauſe the teſtator's couſin, *W*. *Robinſon*, the deviſee over, was not to take till failure of ſuch heirs male. And there, obſerve, *no limitation is added to the eſtates given to the ſon or the iſſue*. So in *Doe* v. *Applin*, 4 *T*. *R*. 82. the deviſe was to *Wm*. *Dymock* for life, and after his deceaſe, to and amongſt his iſſue, *and in default of iſſue*, to be divided between the teſtator's nephew and his niece and their heirs for ever. There the intent of the teſtator was manifeſt that his eſtate ſhould not go over to his nephew and niece while there was iſſue of *Wm*. *Dymock*. In *Doe* d. *Bean* v. *Halley*, 8 *T*. *R*. 5., the deviſe was to the teſtator's nephew *Michael Halley* for life, and after his deceaſe

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to the eldeſt ſon of his ſaid nephew *Michael Halley* and the heirs of ſuch eldeſt ſon; and in default of iſſue male of his ſaid nephew, to *S. Bean*. The Court, in order to effectuate the teſtator's general intent, determined that *Michael Halley* took an eſtate for life, remainder to his eldeſt ſon in tail, remainder to the father in tail, in order to let in all his iſſue male; the *eſtate not being given over but in default of iſſue male of the ſaid* Michael Halley. And there the Court ſo conſtrued the will as to give *Michael Halley* an eſtate for life only, with remainder in tail to his eldeſt ſon, remainder in tail to the father. In all theſe caſes expreſſions were uſed denoting an intention that the lands ſhould continue in the deſcendants of the firſt taker as long as there were any, without ſpecifying or marking what eſtates ſuch deſcendants ſhould take. But in this caſe the deviſor has not uſed general terms, from whence an intent to give a deſcendible eſtate to the iſſue of the firſt deviſee may be collected; but has in expreſs terms narrowed the eſtates which the iſſue were to take to eſtates for life: and this, properly ſpeaking, is not a caſe of *a particular* and *a general* intent, both of which cannot be effectuated, and where the one muſt give way to the other; but a caſe of *ſingle* intent to create, as I have ſaid, a ſucceſſion of eſtates for life not warranted by law. We do not, therefore, feel ourſelves warranted by any rules of conſtruction to ſay that under this deviſe *Thomas Southcomb*, the bankrupt, took any greater eſtate than for his life. And as it is ſtated that previous to the time fixed by the contract for the payment of the money and completion of the purchaſe, or indeed till near the time of trial, no information was given to the purchaſer that the bankrupt was heir at law of the teſtator, but the title of the aſſignees appears to have been delivered in on the ſup-

†6 poſition

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position of the bankrupt being tenant in tail, we think that the defendant has failed in making good the agreement on his part; and that thereupon a right of action at law has accrued to the plaintiff. How far the title since communicated may in another course of proceeding, in another place, render the present proceeding abortive; and whether the plaintiff may not be ultimately compelled to fulfil his agreement, is not for us in this action to decide. We are, therefore, of opinion that the postea must be delivered to the plaintiff.

Friday, May 11th.

The KING *against* HARPER.

A charter granted to the *mayor*, *bailiffs*, and *burgesses*, or the greater part of them to choose *one of themselves* to be mayor. but the same charter appointed the first mayor to continue for a year and until some *other burgess* should be elected and sworn, and the two first bailiffs to continue until two *other burgesses* should be elected and sworn, and it also directed the new mayor to be sworn in before the *last* mayor, his *predecessor*, and the bailiffs for the time being, and the burgesses present; and in like manner the new bailiffs to be sworn in before the mayor and the *last* bailiffs and the burgesses present. These latter provisions explain the first, and shew that the mayor must be chosen out of the *burgesses* at large, and *not* out of the *bailiffs*; and this avoids any question as to the validity of a *swearing in* of an officer before *himself* by his name of office.

AN information in nature of a quo warranto was exhibited against the defendant for exercising the office of mayor of *Liverpool*, in the county of *Lancaster*; to which he pleaded that King *Charles* I., by his charter of the second year of his reign, reciting that the town of *Liverpool* was an ancient town, and that *the mayor*, *bailiffs*, *and burgesses* of the town from time immemorial had enjoyed divers liberties, &c. by prescription, charters, and custom, granted that the *burgesses* and their successors should be incorporated by the name of the *mayor*, *bailiffs*, *and burgesses* of the town of *Liverpool*, &c.; and the king further granted to the said *mayor*, *bailiffs*, *and burgesses*, that there should be *one of the burgesses*, in form thereinafter mentioned to be chosen, who should be called *mayor*; and that there should be *two of the said burgesses*, in form thereinafter mentioned to be chosen, who should

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be called *bailiffs*. And that the mayor, bailiffs, and burgesses for the time being, or the greater part of them, (of whom the said *mayor* and *one of the bailiffs* for the time being should be two,) should have power to make by-laws. And the king nominated Lord *Strange* to be the first mayor, to continue till the feast of *St. Luke* then next following, *and until* some *other burgess* to that office should be elected and sworn, according to the provisions after expressed; and the king also nominated *R. Tarleton* and *J. Southern* to be the two first bailiffs, to continue in the same offices unto the said feast, *and until* two *other of the burgesses* to that office should be in due manner chosen and preferred according to the provisions after expressed, if the said *R. T.* and *J. S.* should so long live, unless in the mean time from that office they, or either of them, should, for reasonable cause, be amoved. And the king further granted to the said mayor, bailiffs, and burgesses, that the *mayor, bailiffs, and burgesses* aforesaid for the time being, or *the greater part of them*, from time to time should have power yearly, upon the feast of *St. Luke*, to choose and nominate *one of themselves* who should be mayor for one whole year then next following, and that after nomination and before admission to that office, he should *take a corporal oath before the last mayor, his predecessor, and the bailiffs for the time being*, and the *burgesses*, or *so many of them as should be then present*, to execute his office rightly, &c.; and if during the year the mayor should die or be amoved, the aforesaid *bailiffs and burgesses*, or the greater part of them for the time being, *one other of themselves* into the office of mayor might choose, &c. for the residue of the year, having first taken a corporal oath in form aforesaid. The king further granted that the said *mayor, bailiffs, and burgesses*, yearly, on the feast

Election of *mayor*.

Election of *bailiffs*.

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of *St. Luke*, ſhould chooſe and name *two of themſelves* who ſhould be bailiffs for the year enſuing, and that after ſuch election, and before admiſſion to that office, they ſhould take a corporal *oath before the mayor and* LAST *bailiff* (*a*) for the time being, and the *burgeſſes*, or ſo many of them as ſhould be then preſent, to execute that office juſtly, &c. for one year next enſuing, unleſs in the mean time, for reaſonable cauſe, by the *mayor and burgeſſes* of the ſaid town, or the greater part of them, they or either of them ſhould be amoved. And in caſe of the death or amotion of the bailiffs, or either of them, within the year, it ſhould be lawful for the ſaid *mayor and burgeſſes* for the time being, or the greater part of them, *one other or two others of themſelves* bailiff or bailiffs to chooſe, &c. The plea then ſtated the acceptance of that charter: and ſet forth another charter, granted in the 7 *Will.* 3., which ratified the former charter: and, in order to do away doubts which had ariſen by an unauthorized acceptance (without ſurrender of the former) of another charter in the 29 *Car.* 2., by which material changes in the government of the town had been introduced, the charter of King *William* gave the corporation a common council of 41 of the burgeſſes, of which 41, one ſhould be called *mayor*, and two ſhould be called bailiffs of the town. The charter then named *T. Johnſon* to be the firſt and modern mayor, to continue in office until the feaſt of *St. Luke*, and until *ſome other of the burgeſſes* to that office ſhould be

Charter of *W.* 3.

(*a*) The original charter had here the word *bailiff* in the ſingular number, and ſome argument was at firſt attempted to be drawn from this by the defendant's counſel, in favour of the ſuppoſition that the caſe might have been contemplated of an election of one of the bailiffs to be mayor: but this was waved on an intimation by the Court that the word was probably put in the ſingular by miſtake, as otherwiſe the word *laſt* (laſt bailiff), as applied to bailiff in the ſingular number, was inſenſible.

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duly appointed and ſworn, according to the proviſions of the charter of 2 *Car.* 1., and nominated *R. Norris* and *L. Hewſton* to be the two firſt and modern bailiffs, to continue until the feaſt of *St. Luke, and until ſome other two of the burgeſſes* ſhould be elected and ſworn, according to the charter of *Car.* 1. The king further granted that the mayor, bailiffs, and burgeſſes for the time being, or any twenty-five of them aſſembled (of whom the mayor and *one* of the bailiffs for the time being to be two) ſhould be a common council, to execute all things, &c. And that if any the mayor, recorder, common clerk, or ſome or any of the bailiffs of the common council ſhould die, or from his office be amoved, depart, or refuſe to ſtand, another fit perſon into his office, &c. ſhould be elected and ſworn in manner as accuſtomed before the charter of the 29th *Car.* 2. The plea then ſtated the acceptance of the charter of King *William*, and averred that the election of mayor, recorder, common clerk, bailiffs, &c. was, before the charter of *Car.* 2., uſed and accuſtomed to be had in the manner and by the perſons preſcribed by the charter of *Charles* I. The plea then ſtated that on the feaſt of *St. Luke*, 18th *October* 43 *G.* 3. *J. Bold* being then mayor, and the defendant and *J. Brooks* then being bailiffs, aſſembled together with the burgeſſes, at the *Exchange* in the town, for the purpoſe of electing a mayor and bailiffs; and that at the ſaid aſſembly he, the defendant, *(ſo being one of the bailiffs)* and alſo a member of the common council, was then and there, *by the ſaid mayor, bailiffs, and burgeſſes* ſo aſſembled for the purpoſe aforeſaid, in due manner *elected to be mayor* for the year enſuing, and thereupon did then and there, and before he took upon himſelf to exerciſe the ſaid office of

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mayor, and before any election had been made of bailiffs for the year next ensuing, *take his corporal oath before* J. Bold *the then last mayor, his predecessor*, and before the said *J. Brooks and himself* the defendant, *being the bailiffs for the time being*, and before divers *burgesses* then and there also present at the said assembly, rightly to execute the said office of mayor, &c., and thereupon the defendant was then and there duly sworn and admitted into the said office of mayor, &c.; and so the defendant justified the user of the office. To this plea there was a general demurrer and joinder.

J. Clarke, in support of the demurrer, contended that the defendant, who at the time of his election was one of the bailiffs, was ineligible to the office of mayor on three grounds: 1st, On the words of the charters. 2. By reason of the duties cast on him as bailiff, which until discharged disabled him from being mayor. 3. Because, according to the terms of the charters he could not properly be sworn in. 1st, The corporation consists of one mayor, two bailiffs, and an indefinite number of burgesses. The charter of *Car.* 1. grants to the mayor, bailiffs, and burgesses, that one of the *burgesses* shall be chosen mayor. The word *burgesses*, though in itself a general term, is there used in contradistinction to *mayor* and *bailiffs*. The first mayor was appointed until some other *burgess* should be elected and sworn: and the two first bailiffs were appointed until two other *burgesses* should be chosen. If the question arose merely on these words there could be no doubt: but the subsequent words will be relied on touching the election of the mayor, where power is given to the *mayor, bailiffs, and burgesses*, or the greater part of

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them, to choose yearly one of *themselves* to be mayor; which relative, *themselves*, will be contended to include all the antecedent parts of the corporation, *mayor*, *bailiffs*, *and burgesses*. But this construction will not agree with what follows; and to make the word *themselves* consistent with the other parts of the charter, it must be restrained to the last immediate antecedent, namely, *burgesses*; for the mayor elect is to take the oath of office before *the last mayor his predecessor*, and *the bailiffs for the time being*. Of necessity therefore those, before whom the newly elected officer is to be sworn, must be excluded from the persons eligible. And unless this be the construction, the old mayor would be as eligible to the same office again as the old bailiffs, which is excluded by the express terms of the charter providing that the new mayor shall be sworn before the *last* mayor *his predecessor*; for a man cannot be the *predecessor* to himself; neither can he at one and the same moment represent the *last* and the *present* mayor in a scene where the two are required to be present, It is a settled rule in the exposition of deeds, that all the parts of an instrument shall be so construed as to stand with each other, if possible. *Shep. Touch. c.* 5. *p.* 84. *pl.* 4, 5. And this construction is fortified by the subsequent charter of *Will.* 3. which directs the mayor to *continue in office* until some other of the *burgesses* should be "duly appointed *and sworn* according to the charter of *Car.* 1." 2dly, The bailiffs have certain duties to perform on the day of election of mayor, which render them respectively incompetent to be elected to that office. It is to be observed that the defendant was elected mayor before any other election of new bailiffs took place; so that he was still in office as bailiff at the time of his election to be mayor.

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The new mayor is to be elected by the *mayor, bailiffs, and burgesses*; so that the attendance of the *bailiffs*, as an integral part, was necessary to form an elective assembly, and to the perfection of the election; and every definite integral part must attend by a majority at least of its number. *Reg.* v. *Lock, M.* 6 *Ann.* (*a*), *Rex* v. *Bellringer* (*b*), *R.* v. *Miller* (*c*), and *R.* v. *Morris* (*d*). But when one of the bailiffs was chosen mayor there ceased to be a majority of the bailiffs existing, so that no other corporate assembly could be holden to fill up the vacancy. And therefore the Court will not put a construction on the charter which would tend to a dissolution of the corporation. 3dly, The new mayor is to be sworn in before his predecessor in office, *and the bailiffs for the time being*: but as the defendant would continue bailiff till he was sworn in, he must necessarily be sworn in *before himself*, which is incongruous and absurd. He cannot act in the double capacity of the person sworn in, and one of the persons before whom he is to be sworn in. That question incidentally arose in *Rex* v. *Malden* (*e*); but it was not necessary to determine it, as the Court thought that at all events the swearing in under the stat. 11 *Geo.* 1. *c.* 4. must be before the presiding officer; and the defendant, who had been elected to the office of bailiff of *Malden* at a corporate assembly at which he himself presided, having been sworn in before the three next in place and office to himself, such swearing in was holden bad under the statute. This is not an objection of form merely, but of substance, growing out of the words of the charter itself. The object of requiring the oath of office to be taken before certain persons

(*a*) 6 *Vin. Abr.* 269. (*b*) 4 *Term Rep.* 810. (*c*) 6 *Term Rep.* 268. (*d*) 4 *East*, 17. (*e*) 4 *Burr.* 2130.

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is, that they may atteſt the ſolemnity of the pledge. An affidavit ſworn by a commiſſioner before himſelf would not be received for defect of the atteſtation that the oath had been properly adminiſtered and taken. [*Lawrence* J. Does the charter in this reſpect mean more than that the oath ſhall be taken before the ſame aſſembly by whom the election is made? The ſame objection, if puſhed to the extreme, might be ſaid to apply to the election even of a *burgeſs*; becauſe the oath is to be taken not only before the laſt mayor and bailiffs for the time being, but alſo before the burgeſſes who attend, of which deſcription the party himſelf would be one.] He then referred to *R.* v. *Tucker* (*a*), where the word *burgeſſes*, out of whom the mayor of *Weymouth* was to be choſen, received a limited conſtruction, as excluding *aldermen*, though they were in a general ſenſe *burgeſſes*.

Lambe for the defendant. Firſt, as to the ſuppoſed ineligibility of a bailiff to be elected mayor, from the words of the charter, the material clauſe is that which directly profeſſes to regulate the election of mayor, and that expreſsly directs the mayor, bailiffs, and burgeſſes, or the greater part of them, to chuſe *one of themſelves* to be mayor; which, in the grammatical and legal conſtruction of the whole clauſe taken together, muſt refer to the mayor, bailiffs, and burgeſſes. The relative muſt refer to the whole antecedent ſentence, and not to the laſt member of it. The choice is to be made by the collective branches of the corporation, or "the greater part of *them*," out of *themſelves*. The word *them* cannot refer merely to burgeſſes, because an election by the burgeſſes

(*a*) 4 *Bro. Parl Caſ.* 455.

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alone without the attendance of the mayor and bailiffs would certainly not be good. Then the word *themſelves* cannot be taken in a more limited ſenſe than the word *them* which precedes it. In *R.* v. *Morris* (a), where the election of mayor was to be made by a majority of the ſeveral integral definite parts of the corporation and other burgeſſes and inhabitants *for the time being*, Lord *Ellenborough* ſaid, that no grammatical conſtruction would admit that the words *for the time being* ſhould refer merely to *inhabitants* as the antecedent laſt named: they muſt certainly refer to all the conſtituent parts of the corporation before named. Then the clauſe is relied on, appointing the firſt mayor to hold over until ſome *other burgeſs* ſhall be appointed. But that expreſſion does not occur in any other part of the charter. And after the firſt appointment of officers all ſucceeding bailiffs would neceſſarily be burgeſſes, and would not ceaſe to be ſuch by becoming bailiffs. And none but the firſt named officers were to hold over till their ſucceſſors were appointed. The natural courſe of coming into office would be firſt as a burgeſs, then as a bailiff, and then as mayor. To ſay that a bailiff is ineligible to be mayor is to require a retrograde motion. The caſe of *R.* v. *Tucker* (b) is very diſtinguiſhable; for there the direction was that the mayor and aldermen ſhould name, not one of *themſelves*, but four of the *burgeſſes and inhabitants*, out of which number the whole body were to chooſe a mayor. So that *burgeſſes* was there put in contradiſtinction to the *mayor and aldermen*. 2dly, As to the incompatibility of the offices of mayor and bailiff; that objection only applies where the ſame perſon holds the two offices at the ſame

(a) 4 *Eaſt*, 17—26. (b) 4 *Bro. Parl. Caſ.* 455.

time;

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time; but here the defendant ceafed to be bailiff at the inftant he became mayor. And he continued bailiff until his appointment as mayor was perfected by fwearing in. Therefore the fwearing in was before the feveral integral parts of the corporation, fuppofing it to be neceffary that both the bailiffs fhould attend; which is not certain; for in the claufe for making by-laws, one of the moft effential powers of the corporation, the attendance of one bailiff only is required. And the oath of the new bailiffs is required to be taken before the "laft *bailiff*," (*a*) which fhews that the charter contemplated that one of the bailiffs might be elected mayor. 3dly, As to the fwearing in, confidering the nature of thefe promiffory oaths of office, which are not like judicial oaths punifhable for the breach of them by an indictment for perjury, being merely binding on the confcience of the officer, there is no incongruity in his taking it (as it is called) before himfelf. The Judges of the fuperior courts take the oath of office before themfelves and each other. So of other officers. The word *before* means no more than *in the prefence of*, and does not imply that the oath is *adminiftered by* thofe *before* whom it is to be taken *to* the officer taking it; but he *takes* it in their prefence. However, if there were any objection on that ground, it may eafily be obviated by firft choofing one of the old bailiffs to be the new mayor, who continues bailiff till fworn in, and then choofing the two new bailiffs, who may immediately be fworn in before the old mayor and old bailiffs, and then the new mayor will be fworn in before the laft mayor, as the charter requires, and the new bailiffs, who will then be in office.

(*a*) *Vide* note (*a*) p. 210.

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J. Clarke, in reply. It is admitted that the second mayor, that is the first *elected* mayor, must have been a *burgess*; then that gave a rule for all future elections. The only clause relied on by the defendants is that the election of mayor is to be made by the *mayor, bailiffs, and burgesses* out of *themselves*, which by the defendant's construction must include the *mayor* as well as the bailiffs, if it include either: but it cannot include the mayor; because the new mayor is to take the oath of office before "the *last* mayor, *his predecessor*;" then the predecessor must necessarily be excluded. Therefore the word *themselves*, as it cannot include *all* those before named, can only refer to *burgesses*, which is the last antecedent. And the exclusion of the bailiffs will make all the different parts of the charter harmonize, and avoid that inverted mode of election and swearing in which is the only expedient offered for avoiding incongruity, and such as could not have been contemplated by the framers of the charter. The oath too is to be taken before the *last* mayor and *the bailiffs for the time being*. The word *last* is there applied to the mayor, because the person to be sworn in is the *new mayor*. And for the same reason the *new bailiffs* are to be sworn in before *the mayor* and the *last bailiffs*. There is no instance before this of a bailiff having been elected mayor.

Lord Ellenborough C. J., after the argument, said that the Court would look more particularly into the charters before they delivered their opinion; though it appeared to him very difficult to sustain the defendant's election by the expedient which had been suggested. And now his Lordship delivered the judgment of the Court.

Court. (After ſtating the mode of election of the mayor and bailiffs as preſcribed by the charter of *Car.* 1., and the manner in which the defendant was in fact elected mayor.)

It appears to us reaſonable to adopt that conſtruction of the charter which is moſt agreeable to the natural order and courſe of proceedings obſerved in ſuch elections, and which will prevent all difficulties, rather than that, which, unleſs ſome degree of management and contrivance is reſorted to, would make it impoſſible to elect other officers: and particularly where the charter, as here, expreſsly directs that the firſt mayor ſhould continue till ſome *other* burgeſs ſhould be elected into that office, and the firſt bailiffs in like manner ſhould continue till two *other* of the burgeſſes ſhould be choſen to that office: thereby importing an excluſion of the *ſame* mayor and burgeſſes from being again immediately elected into the *ſame offices* at leaſt. If the new mayor and bailiffs be elected from the *burgeſſes* only, excluſive of *the old mayor and bailiffs*, (and the mode preſcribed by the charter of ſwearing in the mayor *coram predeceſſore* clearly ſhews that the word *burgeſſes* muſt be narrowed in conſtruction to ſome extent, and ſo as to exclude the preceding mayor at leaſt,) it will then be immaterial which deſcription of officers is ſworn in firſt. For till the new mayor is ſworn in, his predeceſſor will continue in office, at leaſt for the whole of that day: and till the new bailiffs are ſworn in, their predeceſſors alſo will be in office. So that if the mayor be ſworn in laſt, he will be ſworn before his predeceſſor and the bailiffs; and though ſuch bailiffs be the new ones, it will nevertheleſs ſatisfy the terms of the charter: and though the bailiffs are ſworn in firſt, they

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will be ſworn before the *old mayor*, (which will ſatisfy the words of the charter,) and their predeceſſors the laſt bailiffs. This conſtruction would alſo prevent any queſtion as to the validity of a ſwearing in of the mayor *before himſelf*, ſuppoſing the words of the charter, inſtead of requiring as it has done a ſwearing in before the whole aſſembly, one of whom of courſe muſt be the perſon to be ſworn, had limited the ſwearing to be before a part of the aſſembly, as for inſtance, the mayor and bailiffs. We are of opinion, therefore, that this conſtruction is the proper one to be put upon the terms of this charter, and that of courſe the election ſtated in the defendant's plea not being conformable thereto, was not well made; and therefore that there muſt in this caſe be judgment of ouſter againſt the defendant.

Judgment of Ouſter.

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Saturday, May 12th.

The father of a child is entitled to the cuſtody of it, though an infant at the breaſt of its mother: if the Court ſee no ground to impute any motive to the father injurious to the health or liberty of ſuch a child, as by ſending it out of the kingdom; the father being at the time an *alien enemy* domiciled in this kingdom, and the mother being an *Engliſhwoman*, and *apprehenſive* only that he meant to ſend the child abroad, but aſſigning no ſufficient reaſon for ſuch her apprehenſion.

AT the beginning of this term a writ of habeas corpus was obtained, directed to the defendant, to bring up the body of an infant of eight months old, the defendant's daughter, upon an affidavit from the mother and her friends that the defendant, who was a *Frenchman*, had married the mother of the child, an *Engliſhwoman*, by whom he had this only child. That ſhe not long after their marriage had ſeparated herſelf from him on account, as ſhe alleged, of ill treatment, and kept the child whom ſhe was nurſing with her. That on the night of the 10th of *April* laſt the defendant found means, by force and ſtratagem, to get into the houſe where ſhe was, and had forcibly taken the child then at the breaſt, and carried it away almoſt naked in an open carriage in inclement weather; with a view, as the mother apprehended, of taking it out of the kingdom. However, when this part of the affidavit was afterwards more particularly referred to, it appeared that the only ground for ſuch apprehenſion of the mother was, that the defendant had threatened to carry away the mother to a diſtance from her friends, and afterwards had threatened to take away the child from her, and ſhe was *apprehenſive* that he meant to carry it *to ſome remote part of the kingdom or to* France.

Topping now (after the return read, and the child being ready to be produced in court when called for) ſaid, that he had affidavits in anſwer, which he would wave reading, if not neceſſary, to prevent widening the breach between the

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the parents. But he contended that the father was by law entitled to the cuſtody of his child; and that the only ground upon which the Court had granted the writ, namely, on the ſuppoſition that the father had threatened or had otherwiſe given reaſon to believe that he meant to ſend the child out of the kingdom, was removed upon referring more accurately to the terms in which that part of the mother's affidavit was ſworn. And he referred to the caſe of Mr. *Lytton*, which came before this Court on an application for a habeas corpus in 1781 by the mother to bring up the body of a child who had been placed at ſchool, from whence it had been taken by the father. In that caſe there had been articles of ſeparation, by which the father had bound himſelf to let the mother have acceſs to the child. And there Lord *Mansfield* ſaid, that the Court could not at any age take a child from the father. But that as he had conſtrained himſelf by the articles to let the mother have acceſs to the child, if he choſe to take the child home, he muſt provide for the acceſs of the mother to it there.

Lord ELLENBOROUGH C. J. obſerved, that as the ground of removal out of the kingdom was done away, it lay on thoſe who applied for the writ to ſhew that the father was not entitled to the cuſtody of the child.

Erſkine, *Garrow*, and *Gibbs*, then ſuggeſted that the father was now *an alien enemy*, and therefore the apprehenſion of the mother that he might carry the child out of the kingdom was not unreaſonable, eſpecially as he was liable himſelf to be ſent out of the kingdom under the alien act at a moment's warning. That the child

being

being born of an *English* mother here was entitled to the protection of the laws, and ought not to be exposed to the smallest risk of being removed. That it is of very tender age, and considering that its removal from the mother deprived it of its accustomed proper nutriment was an additional reason for restoring it to her possession, particularly when the father had obtained possession of it by force and stratagem, and in a manner so dangerous to it.

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Lord ELLENBOROUGH C. J. (stopping *Topping*, who wished to have his affidavits upon the merits read). We draw no inferences to the disadvantage of the father. But he is the person entitled by law to the custody of his child. If he abuse that right to the detriment of the child, the Court will protect the child. But there is no pretence that the child has been injured for want of nurture, or in any other respect. Then he having a legal right to the custody of his child, and not having abused that right, is entitled to have it restored to him.

LAWRENCE J. Since Mr. *Lytton*'s case, there was another of the same sort upon an application of Sir *W. Murray* to obtain possession of a child of five years old, which the mother kept from him. Lord *Kenyon* had no doubt but that the father was entitled to have the custody of the infant, unless the Court saw reason to believe that he intended to abuse his right by sacrificing the child, which was suggested to be his motive for getting possession of it. In that case Sir *W. Murray* had been divorced from the mother, and there was not, as it was alleged, any reason to think the child his, though born before the

divorce.

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The King against De Manneville. Hil. 38 Geo. 3. Friday, Feb. 9th, 1798.

If the putative father of a bastard child obtain possession of it by force or fraud, the Court will order it to be restored on the application of the mother.

divorce. But the Court did not think that a sufficient ground to deny him the custody of it.

Per Curiam, Let the child be remanded to the custody of the father (a).

(a) Rex against Moseley.

Mingay moved for a writ of habeas corpus to the defendant, to bring up the body of a bastard child of five years old, which a young woman had had by the defendant, and he cited *Rex* v. *Soper*, 5 *Term Rep.* 278., as in point; where it was holden that the putative father had no right to the custody of the child.

Lord Kenyon C. J. Take a rule. Where the father has the custody of the child fairly, I do not know that this Court would take it away from him; though I do not mean to impeach the propriety of the case cited. But where he has got possession of the child by force or fraud, as is here suggested, we will interfere to put matters in the same situation as before. Rule granted.

END OF EASTER TERM.

CASES

1804.

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Forty-fourth Year of the Reign of GEORGE III.

OSBORNE and AMPHLETT *against* HARPER.

Saturday, June 2d.

A., B., & C. having dissolved partnership, *C.*, after such dissolution, drew bills in the partnership firm in favour of *D.*, he not knowing of such dissolution, upon which *D.* brought his action against all the former partners, and *C.* having pleaded his bankruptcy, *D.* entered a noli prosequi as to him, and recovered judgment against *A.* and *B.*, which was afterwards satisfied by the attorney of *A.* and *B.*, who advanced part, and borrowed the rest of the money on their *joint* credit: held that the sum *so paid* in satisfaction of the judgment might be recovered in a *joint* action by *A.* and *B.* against *C.*

THE plaintiffs brought assumpsit for money paid, money lent and advanced, &c. in order to recover a sum of 1156*l.* paid by them to one *J. Spooner*, in consequence of a judgment obtained by *Spooner* in a joint action against the plaintiffs and the defendant. At the trial before *Rooke* J. at the last *Warwick* assizes, the record of the former action was proved, whereby it appeared that it was an action brought by *Spooner* on certain bills of exchange drawn in his favour by *Harper* and Co., (*i.e.* the defendant and the present plaintiffs in this action,)

 to

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to which action non assumpsit was pleaded; and the defendant *Harper* further pleaded his bankruptcy, against whom the plaintiff *Spooner* entered a noli prosequi, and proceeded against the present plaintiffs, and recovered judgment, and sued out execution against them for 1156*l.* It further appeared by the evidence of the attorney for the defendants in that action, that the bills of exchange on which the recovery was had were drawn in the year 1802, by *Harper* the defendant, in the names of *Harper* and Co., and that on that trial *Harper* himself, being called as a witness, had sworn that the partnership between him and the present plaintiffs commenced in 1795, and in *October* 1796 was entirely dissolved, since which time there had been no partnership dealings between them; nor, as appeared by other evidence, between the present plaintiffs. That the question in the former cause was, Whether *Spooner* had any knowledge of the dissolution of the partnership before the bills were given? and the fact of such knowledge not appearing to the jury, they found a verdict for *Spooner* against the present plaintiffs. The attorney further proved that he had discharged the whole demand *at the request of the present plaintiffs.* Upon this evidence it was contended at the trial that the plaintiffs could not maintain a *joint* action against the defendant, but each ought to have brought a separate action for his moiety of the damages paid. The learned Judge, however, over-ruled the objection, and directed a verdict for the plaintiff, with liberty to the defendant to move to set aside the verdict and enter a nonsuit if the Court should be of a different opinion. A rule nisi was obtained for that purpose in the last term, against which

Wood, *Clarke*, and *Reader*, now shewed cause, and contended that the plaintiffs might well maintain this *joint* action

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action againſt their former partner, for whom they had paid this money in conſequence of his own act and default after the diſſolution of their former partnerſhip; 1ſt, becauſe the plaintiffs were ſued in the former action *as partners*, and the money was recovered againſt them upon a *joint* judgment, under which each was liable to have had the whole damages levied upon him; and therefore whatever was paid by either was paid *for both*. 2dly, At all events, as the money was paid by the attorney *at the requeſt of the preſent plaintiffs*, it muſt be conſidered as advanced on their *joint* credit, and therefore conſtituted a *joint* fund. And they cited *Thompſon's* caſe (*a*), *Ward and Others* v. *Brampſton* (*b*), and *Graham and Others* v. *Robertſon* (*c*): and anſwered the caſe of *Brand and Herbert* v. *Boulcott* (*d*), (which was ſuggeſted è contrà) by obſerving, that it was there expreſsly ſtated that the two aſſignees of a bankrupt, who had joined in bringing the action againſt a third aſſignee for his proportion of a ſolicitor's bill who had been employed as ſuch by the three, had *each* (*i. e.* of the two plaintiffs) *paid half the bill*; that, therefore, was taken to be a payment by each of the plaintiffs of a certain ſum out of his own ſeparate funds, and not out of or in reſpect of any *joint* fund or credit, and conſequently they could not join in the action.

Vaughan Serjt., in ſupport of the rule, relied upon the caſes of *Graham and Others* v. *Robertſon*, and *Brand and Herbert* v. *Boulcott*, before cited, as in point for the defendant. In the former, the plaintiffs, together with *A.* and *B.*, being owners of one privateer and the defendant of another, a prize was taken, condemned, and ſhared by

(*a*) *Noy*, 130. (*b*) 3 *Lev.* 362.
(*c*) 2 *Term Rep.* 282. (*d*) 3 *Boſ. & Pul.* 235.

 agree

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agreement between the owners of the two ſhips; and ſentence of condemnation having been afterwards reverſed, reſtitution with coſts was awarded, which was paid ſolely by the plaintiffs; their co-partners, *A.* and *B.*, having in the mean time become bankrupts. And it was holden that the plaintiffs could not maintain the action againſt the defendant for a moiety of the ſum ſo paid; for either it was a partnerſhip tranſaction, when *A.* and *B.* ought to have been joined; or otherwiſe it ſtood as a ſeparate payment by each individual, and each ſhould have brought a ſeparate action for what he actually advanced. So here the partnerſhip having been put an end to, there was no joint fund belonging to the plaintiffs out of which the damages could have been paid, but what was paid by each towards them muſt have been taken out of his own pocket. If after payment of the damages one of the plaintiffs had died, the remedy would not have ſurvived to the other as in the caſe of partners.

The Court expreſſed great doubt upon the queſtion when it was diſcuſſed at the bar, and ſuggeſted ſeveral difficulties for the attention of the plaintiffs' counſel in the courſe of their argument; but that which weighed moſt ſtrongly with them was that it did not appear in point of fact that the damages in the former action had been paid out of any *joint* ſtock or fund, without which they conſidered that a *joint* action for repayment of the ſum advanced by the plaintiffs for the uſe of the defendant could not be ſupported. For without a *joint fund* out of which the payment was to be made there could be no *joint payment.*

Lord ELLENBOROUGH C. J. at laſt obſerved upon the evidence given by the attorney for the plaintiffs, " that he had

had discharged the whole demand at the request of the present plaintiffs:" which, he said, seemed to convey the idea that the plaintiffs had borrowed the money *jointly* of their attorney for the purpose of paying the damages, and then it might be considered as a *joint* payment by them, out of which a *joint* cause of action would accrue. But if each of the plaintiffs contributed his share of the money put into the attorney's hands for the purpose of satisfying the damages, that would not constitute a joint demand against the defendant, but each must sue separately for his particular advance.

The Court therefore finally directed that the plaintiffs' attorney should make an affidavit, stating particularly in what manner the money paid by him had been obtained; whether he had paid it out of his own pocket upon the *joint* credit of the plaintiffs, making them *jointly* liable to him for the whole; or whether each of the plaintiffs had in the first instance contributed so much of their own money, with which he had afterwards made the payment. And they observed that it was necessary to have the fact stated with more precision than it appeared upon the report, as the case would furnish a material precedent in future.

On a subsequent day in the term the affidavit required was produced, stating that the plaintiffs' attorney had advanced 500*l.* on the *joint credit* of the plaintiffs, and had borrowed the remainder upon their *joint note*, with which he had discharged the execution.

Lord ELLENBOROUGH C. J. then said that that created a *joint* fund for the discharge of the execution, and con-

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sequently the plaintiffs were entitled to maintain a *joint* action for the repayment of the money so advanced.

Per Curiam, Rule discharged.

Monday, *June* 4th.

Fitch *against* Sutton.

Acceptance of a less cannot be a satisfaction in law of a greater sum then due: nor can it operate as an extinguishment of the original cause of action, though accompanied by a conditional promise to pay the residue when of ability.

THIS was an action of indebitatus assumpsit for goods sold and delivered. Plea, non assumpsit. At the trial before *Heath* J. at the last *Chelmsford* assizes it was proved that the defendant was, prior to his insolvency, indebted to the plaintiff in 50*l.* for goods sold and delivered. That in consequence of his insolvency the defendant compounded with all his creditors, and paid them 7*s.* in the pound, and at the time of such payment to the plaintiff promised him to pay him the residue of his debt when he should be of ability so to do; which he was proved to have been before the action brought. On the other hand, the defendant produced a receipt signed by the plaintiff, and dated 29th of *March* 1802, for a composition of 7*s.* in the pound for his debt of 50*l.*, which he acknowledged to be in full of all claims and demands from the beginning of the world to that day: which receipt it was insisted was either a discharge of the promise, or otherwise that the promise itself was void, as having been made in fraud of the other creditors. But the plaintiff's counsel contended that the acceptance by a creditor of a less sum in satisfaction of a greater was no discharge of the debt, unless it were by deed; and they relied on the case of *Heathcote* v. *Crookshanks* (*a*). The learned Judge however, not having the case before him, directed the jury to find for the defendant, and saved the point for

(*a*) 2 *Term Rep.* 24.

the

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the plaintiff, if the authority ſhould be found to ſupport him. A rule niſi was accordingly obtained by *Shepherd* Serjt. for ſetting aſide the verdict, and having a new trial; againſt which

Beſt Serjt. now ſhewed cauſe, and admitting that accord without ſatisfaction was no defence to an antecedent demand, endeavoured to diſtinguiſh this from the caſe of *Heathcote* v. *Crookſhanks*, becauſe there the compoſition agreed to be taken at one time by the creditor was afterwards refuſed to be accepted by him; it was accord without ſatisfaction; and the plea there only ſtated a tender and refuſal: whereas here the compoſition was actually accepted by the plaintiff in ſatisfaction of his whole demand. But if that were otherwiſe, the plaintiff ought not to have declared upon the old cauſe of action for goods ſold and delivered, which was done away by the receipt given in conſideration of the compoſition received and the new promiſe; but he ſhould have declared ſpecially upon ſuch new agreement, which was conditional for the payment of the reſidue when the defendant ſhould be of ability. And he cited *Knight* v. *Cox* (*a*), where the creditor having accepted a compoſition and ſigned a releaſe to the defendant, who in conſideration thereof promiſed to pay him the entire debt; it was holden to be a good defence on non aſſumpſit for the original cauſe of action, which was for goods ſold and delivered, and that the plaintiff ought to have declared ſpecially upon the ſpecial promiſe.

Lord ELLENBOROUGH C. J. In the laſt-mentioned caſe the original contract was extinguiſhed by the releaſe:

(*a*) Before *Pemberton* C. J. in *Suſſex*, 1682. *Bull. N. P.* 153.

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but it cannot be pretended that a receipt of part only, though expreffed to be in full of all demands, muft have the fame operation as a releafe. It is impoffible to contend that acceptance of 17*l.* 10*s.* is an extinguifhment of a debt of 50*l.* There muft be fome confideration for the relinquifhment of the refidue; fomething collateral, to fhew a poffibility of benefit to the party relinquifhing his further claim, otherwife the agreement is nudum pactum. But the mere promife to pay the reft when of ability put the plaintiff in no better condition than he was before. It was exprefsly determined in *Cumber* v. *Wane* (*a*), that acceptance of a fecurity for a leffer fum cannot be pleaded in fatisfaction of a fimilar fecurity for a greater. And though that cafe was faid by me in argument, in *Heathcote* v. *Crookfhanks*, to have been denied to be law; and in confirmation of that Mr. Juftice *Buller* afterwards referred to a cafe, (ftated to be that of *Hardcaftle* v. *Howard*, *H.* 26 *Geo.* 3.); yet I cannot find any cafe of that fort, and none has been now referred to: on the contrary, the decifion in *Cumber* v. *Wane* is directly fupported by the authority of *Pinnell*'s cafe (*b*), which never appears to have been queftioned.

The other Judges concurred; and *Lawrence* J. referred to *Co. Lit.* 212. *b.* and to *Adams* v. *Tapling* (*c*), as confirmatory of the fame doctrine: in the former of which it is laid down, that " where the condition is for payment of 20*l.* the obligor or feoffor cannot at the time appointed pay a leffer fum in fatisfaction of the whole, becaufe it is apparent that a leffer fum cannot be a fatisfaction of a greater. But if the obligee or feoffee do at the day receive part, and thereof make an acquittance *under his feal*

(*a*) 1 *Stra.* 426. (*b*) 5 *Rep.* 117. (*c*) 4 *Mod.* 88.

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in full satisfaction of the whole, it is sufficient, by reason *the deed* amounteth to an acquittance of the whole. If the obligor or lessor pay a lesser sum either *before* the day or at *another place* than is limited by the condition, *and* the obligee or feoffee *receiveth it*, this is a good satisfaction."

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Rule absolute.

MILTON *against* GREEN and JENNER.

Monday, June 4th.

Where goods were taken by constables under a warrant of distress granted by a justice of peace for the county of *Kent*, directed "to the constables of the Lower Half Hundred of *C.* and *G. in the county of* Kent," which warrant recited that the plaintiff (whose goods were distrained) *of the parish of* G. *in the said county*, was ballotted for the militia of the said county, and having refused to serve, &c. was convicted in a certain penalty, for levying which the warrant was granted: if it turn out that the warrant was executed within a certain part of the parish of *G.*, within the jurisdiction of the Cinque Ports, and not within the county of *Kent*, the constables are not within the protection of the stat. 24 *Geo.* 2. *c.* 44. *s.* 6., and may be sued in trespass without the magistrate's being made a defendant.

TRESPASS for breaking and entering the stable and close of the plaintiff within the manor of *Grench*, otherwise *Grange*, in the parish of *Gillingham*, in the county of *Kent*, and taking the plaintiff's goods there, and detaining the same until he paid 15*l*. 10*s*. The action was brought in order to try whether the manor of *Grench* lay within and was part of the jurisdiction of the *Cinque Ports* (that is, a member of *Hastings* in *Sussex*), or within that part of the parish of *Gillingham* which lies within the body at large of the county of *Kent*. If the former, as the plaintiff contended, then he was not liable to be ballotted for a militiaman for the county at large. At the trial of this cause before *Hotham* B. at the last assizes for the county of *Kent*, the following facts were admitted; that the residence of the plaintiff and the premises mentioned in the declaration, where the distress was taken, are situated *within the manor of* Grench *in the parish of* Gillingham; and that previous to the taking of the distress the plaintiff was convicted by Mr. *Elliott*, a deputy lieutenant and justice of the peace acting for the county of *Kent*, of having neglected and refused to be duly sworn and inrolled, or to find a fit substitute in the *West Kent* militia;

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he having been ballotted from the list of the inhabitants of the parish of Gillingham. That *the defendants were* at the date of the warrant and at the time of the seizure of the goods, *borsholders of the lower half hundred of* Chatham *and* Gillingham, duly appointed and sworn. The warrant was as follows: " *Kent*, to wit.—*To the constables of the lower* " *half hundred of* Chatham *and* Gillingham *in the said* " *county*, and *to the borsholders there.*—Whereas at a subdi-" vision meeting of his Majesty's deputy lieutenants and " justices of the peace for the said county, holden at " *R.* &c. on the 8th *July* last, *Samuel Milton of the parish* " *of* Gillingham *in the said county* was chosen by lot to serve " in the *West Kent* regiment of militia; and whereas " it appears unto me, one, &c. upon oath, &c. that the " said *S. M.* hath been duly summoned to appear at a " subdivision meeting, &c. to be duly sworn and inrolled, " or to provide a fit substitute, &c., and hath neglected " and refused so to do, whereby he hath incurred the " penalty of 15*l.*; These are therefore to require you to " demand of the said *S. M.* the sum of 15*l.* by him in-" curred as aforesaid, and on neglect, &c. of payment, to " levy the same by distress," &c. Dated 20th *August* 1803, and signed *T. Elliott.* That the defendants entered and made the distress by virtue of the warrant, and that the plaintiff redeemed his goods for 15*l.* 10*s.* There were also read various extracts from the minute books of the justices and deputy lieutenants for the subdivision of *Chatham*, discharging and excusing different persons from the militia for the county of *Kent*, who at the time of the ballots were resident within that part of the parish of *Gillingham* contended to be within the liberties of the *Cinque Ports*. And the plaintiff's counsel alleged that he meant to prove that the part of the parish where the plaintiff

plaintiff lived was not within the lower half hundred of *Chatham* and *Gillingham*, but within that part of the parish of *Gillingham* lying within the manor of *Grench*, within the liberties of the *Cinque Ports* (whose militia is raised distinct from the adjoining counties). But it was objected on the part of the defendants, that they having acted only as subordinate ministerial officers under the magistrate's warrant, the magistrate ought to have been made a party defendant to the action under the stat. 24 *Geo.* 2. *c.* 44. *s.* 6. And upon that objection the plaintiff was nonsuited. 1804. MILTON *against* GREEN.

Best Serjt., *Pitcairn*, and *Reynolds* shewed cause against a rule for setting aside the nonsuit. If the constables acted in obedience to the warrant of the magistrate, he ought to have been joined in the action, and the officers were entitled to an acquittal under the statute for want of such joinder, notwithstanding any defect of jurisdiction in the magistrate granting such warrant. Now here it appears that the magistrate has taken upon him to determine that the plaintiff by residing in the parish of *Gillingham* was liable to serve as a militiaman for the county of *Kent*. The fact of the plaintiff's residence within the parish was within the jurisdiction of the magistrate to determine, and if part of that parish be without and part within his jurisdiction, it was for the magistrate to decide whether the plaintiff inhabited within that part over which he had jurisdiction, and by granting the warrant of distress against the plaintiff he assumed to have jurisdiction over that part of the parish where the plaintiff resided. [Lord *Ellenborough* C. J. The constables must justify themselves under the warrant of distress, and nothing appears in that to direct the distress to be taken where it

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was, within the manor of *Grench*. The warrant is directed "to the conſtables, &c. of the lower half hundred of *Chatham* and *Gillingham in the county of* Kent." If the part of the pariſh of *Gillingham* in which the diſtreſs was taken do not lie within the limits of the county of *Kent*, but in another diſtinct jurisdiction, the warrant will no more juſtify the officers in going there to execute it than if they had gone into the county of *Suffolk*. The *Cinque Ports* are, as to the authority of juſtices of the peace, as much a diſtinct juriſdiction from the county of *Kent* as if they were denominated a diſtinct county. The warrant does not ſpecify that the plaintiff reſided within the manor of *Grench*, aſſuming that to be within the juriſdiction of the magiſtrate, or direct the defendants to go there. There is no exceſs of juriſdiction aſſumed on the face of the warrant. It muſt be taken to be applicable to ſuch parts only of the pariſh of *Gillingham* as lie *within the county of* Kent, and thoſe were within the magiſtrate's juriſdiction. *Lawrence* J. If the conſtables had returned to the warrant of diſtreſs that the plaintiff had no goods within the county of *Kent* lying within the magiſtrate's juriſdiction, and that fact were true, they could not have been indicted for diſobedience to the warrant.] In order to make the conſtables executing a warrant liable, the exceſs of juriſdiction muſt be apparent: now here the boundaries of the two juriſdictions are in diſpute, and the limits unknown to the officers, who cannot be expected to decide the doubt at their own peril. If there be a warrant to an officer to ſeize *ſtolen goods*, and he ſeize goods which turn out not to have been ſtolen; ſtill, if he acted bonâ fide, he is within the protection of the ſtatute. *Price* v. *Meſſenger* (*a*). So in *Hill* v. *Bateman* (*b*), though the

(*a*) 2 *Boſ & Pull.* 158. (*b*) 1 *Stra.* 710.

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justice exceeded his jurisdiction in committing one instanter for an offence under the game laws, who had goods whereon a distress might have been levied, yet the constable making the arrest was protected. This is not like *Blatcher* v. *Kemp* (a), where a constable of one hundred took upon him to execute a warrant out of his own hundred, directed to the constable of another hundred by name, " and to all other peace officers in the county of *Kent;*" which latter direction was construed to mean each *within his own jurisdiction*, according to *Rex* v. *Chandler* (b): nor like *Money* v. *Leach* (c), where the constable arresting a person under a general warrant, illegal on the face of it, was holden not to be within the protection of the statute. The warrant here is to distrain the goods of " *Samuel Milton* of the parish of *Gillingham* in the county of *Kent* :" and it does not appear that there was any other *Samuel Milton* living in that parish than the plaintiff whose goods were distrained. Non constat even that that part of the parish of *Gillingham* which lies within the manor of *Grench* is not within the magistrate's jurisdiction: but this question cannot be *tried* without making the magistrate himself a defendant.

Shepherd Serjt. and *Garrow* contrà were stopped by the Court.

Lord ELLENBOROUGH C. J. If the magistrate had directed the constable to execute his warrant within the manor of *Grange*, no doubt the constable would have been protected, though it should turn out that the manor of *Grange* is not within the jurisdiction of the magistrate. But the objection is not to the warrant, which is proper

(a) *Maidstone* Sum. Ass. 1782, cor. Lord *Mansfield*, 1 *H. Blac.* 15. n.
(b) 1 *Ld. Ray.* 545. (c) 1 *Blac.* 555

enough

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enough on the face of it, but that the defendants have chosen to execute it out of the jurisdiction of the magistrate granting it. The warrant is only directed to be executed *within the county of* Kent, and for the purpose of this argument we must assume that it was executed *out* of the county. The defendants have not therefore acted in obedience to the warrant, without which they are not within the protection of the statute. If the fact ultimately turn out to be otherwise, it will be time enough to take the objection.

GROSE J. The question is, Whether the plaintiff should not be permitted to shew that the defendants did the act complained of out of the jurisdiction of the magistrate who granted the warrant? The plaintiff does not accuse the magistrate of having ordered the constables to do an illegal act, but he accuses the constables of having so done without the magistrate's authority.

LAWRENCE J. The question is precisely that which my Brother *Grose* has stated, Whether the plaintiff, after the production of the magistrate's warrant by the defendants, should not have been permitted to go on further and to have shewn that the defendants had not acted in obedience to that warrant, by taking the goods out of the jurisdiction of the county magistrate by whom it was granted? The plaintiff had been ballotted for the militia as a parishioner of *Gillingham*, part of which parish is confessedly within the county of *Kent*. But the plaintiff lives in the other part of the parish, contended to be within the manor of *Grench*, which manor is said to be within the jurisdiction of the *Cinque Ports*, and not within the limits of the county magistrates: whereas the warrant is directed

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directed to the defendants to be executed *within the county of* Kent. Surely then the plaintiff was at liberty to ſhew the extent of the manor of *Grench*, and that he reſided within that manor, and out of the juriſdiction of the county magiſtrate.

LE BLANC J. The complaint is that the plaintiff has been prevented from ſhewing the whole facts of the caſe upon which the queſtion ariſes. He has not been permitted to give evidence that the place where the goods were taken lies without the juriſdiction of the county magiſtrate, whoſe warrant is confined to be executed within the county; and conſequently that the conſtables exceeded their authority in executing the warrant in that place. The warrant has "*Kent*" in the beginning of it, and is directed "to the conſtables of the Lower Half Hundred of *Chatham* and *Gillingham*, *in the ſaid county*, and to the borſholders *there*." If then it were executed in any other part of the Lower Half Hundred of *C.* and *G.* than that which lies *within the county of* Kent, it will be no protection to them.

Rule abſolute.

The KING *againſt* The Inhabitants of CHIPPING-NORTON.

Wedneſday, June 6th.

Where a corporation by a verbal agreement with the pauper leaſed to him the tolls of a market for above 10*l.* a-year; held that he could not gain a ſettlement thereby, as no intereſt could paſs from a corporation but under their ſeal: therefore he had no more than a mere licence to collect the toll: but if ſuch toll had been leaſed to him under ſeal of the corporation, ſemble that he would have gained a ſettlement by reſiding for 40 days in the ſame pariſh where the market was.

TWO juſtices removed *Sarah* the wife of *Wm. Townſhend* and their children, by name, from the pariſh of *Chipping-Norton* to the hamlet of *Over Norton*, both in

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the county of *Oxford*: and on appeal the Sessions stated specially that *William Townshend*, whose wife and children were removed, being legally settled in the hamlet of *Over-Norton*, went, about eight years ago, to live at *Chipping-Norton*, where he rented a house at 8*l*. 10*s*. per ann. The corporation of *Chipping-Norton* is possessed of the fairs and markets within the borough, and of the toll for all cattle *actually sold at the same*. *W. Townshend*, at a court leet, took the said toll by a verbal agreement of the corporation at 12*l*. a-year, and continued to collect it under that agreement for two years, when it was agreed that he should have it for 10 guineas: under which last agreement he continued to collect it for several years more. Whereupon the Sessions were of opinion that *W. Townshend* gained a settlement *by virtue of renting a tenement of upwards of* 10l. *a-year*; and discharged the order; subject to the opinion of this Court.

Gibbs, *Abbott*, and *Peckwell*, in support of the order of Sessions, contended that the pauper, by taking the market tolls at above 10*l*. a-year, took a tenement within the statute, by which, and residence in the same parish for 40 days, he gained a settlement. An *incorporeal* tenement is a tenement within the statute: Lord *Kenyon*, in *Rex* v. *Piddletrenthide* (*a*), said it had been often so decided; and so said Lord *Ellenborough* in *R.* v. *Hollington* (*b*). And in the former case it was holden that renting a rabbit warren would gain a settlement, though the soil did not pass. A free warren, he also said, would give a settlement, and that a præcipe would lie for it. And *Buller* J., in *R.* v. *Old Alresford* (*c*), thought the same of a free fishery. So

(*a*) 3 *Term Rep.* 775. (*b*) 3 *East*, 114.
(*c*) 1 *Term Rep.* 361.

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tithes are a tenement (*a*). Market tolls are freehold; and can only be devised according to the requisites of the statute of frauds. The word *tenements*, says Lord *Coke* (*b*), includes not only all corporate inheritances which are or may be holden, but also "all inheritances issuing out of any of those inheritances, or concerning or annexed to or exercisable within the same, though they lie not in tenure; therefore these may, without question, be intailed, as rents, estovers, commons, or other profits whatsoever granted out of land; or uses, offices, dignities, which concern lands, or certain places, &c. because all these savour of the realty." A Quod permittat lay for tolls at common law (*c*). And so does an assize (*d*) for tolls of a market. So a woman may be endowed of tolls (*e*) and stallage. The origin of toll in a market was probably connected with the right of the soil, though long since dissevered. If it had been merely to testify the contracts of sale made there, it could never have been considered as a privilege to be exempt from it, such as tenants in ancient demesne claim. The renting of tolls has been so much considered as the taking of a tenement within the stat. 13 & 14 *Car.* 2., that by *s.* 56 of the general Turnpike Act, 13 *Geo.* 3. *c.* 84., it is expressly provided that no toll-gate keeper shall gain a settlement by renting the tolls.

Mackaness (and with him were *Erskine* and *Lockart*) contended that this was a mere personal contract with the pauper, giving him liberty to collect the tolls from the vendors of cattle, and not a tenement within the words

(*a*) *R.* v. *Skingle*, 1 *Stra.* 100. (*b*) *Co. Lit.* 19. *b.* 20.
(*c*) Vide *Fitz. Na. Brev Quod Permittat.*
(*d*) *Webb*'s case, 8 *Rep.* 46. *b.* (*e*) *Co. Litt.* 32. *a.*

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of the ſtatute, or within the principle of any of the adjudged caſes; but more like the caſes of *R.* v. *Hammerſmith* (*a*), *R.* v. *Dodderhill* (*b*), and *R.* v. *Mellor* (*c*). And he referred to *Woddeſon*'s Lectures, and was purſuing this courſe of argument, when another objection was ſtarted, that the pauper had no title to the tolls, even ſuppoſing that ſuch a taking could confer a ſettlement; for that a corporation could only demiſe under *ſeal*, and here the tolls were ſtated to have been taken by a *verbal* agreement.

Lord Ellenborough C. J. thereupon ſaid, that as no intereſt paſſed to the pauper by ſuch parol demiſe, the queſtion could not be raiſed. It was a mere licence to him to collect the tolls, the right to which ſtill remained in the corporation; though it might be a ground on which to apply to a court of equity. The Court, he added, had gone far enough from the words of the ſtatute in noticing an incorporeal tenement as one the taking of which could confer a ſettlement; but if, beyond that, they were to hold that an equitable intereſt in an incorporeal tenement under a parol demiſe from a corporation, which could only demiſe by deed, could confer a ſettlement, there would be no ſaying where to ſtop. His Lordſhip, however, added, that if this laſt difficulty could be gotten rid of by any alteration in the ſtatement of the caſe, he thought that the other point, as to the taking of the tolls being a taking of a tenement within the conſtruction which had been put upon the ſtatute, might be diſpoſed of in favour of the ſettlement, upon the authority of Lord *Coke*, in his comment upon the ſtatute of *Weſtminſter*, 2., and on *Webb*'s caſe, 8 *Rep.*, and on the opinion

(*a*) 8 *Term Rep.* 450. *n.* (*b*) *Ib.* 449. (*c*) 2 *Eaſt.* 189.

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of Lord *Kenyon*, in the case referred to, that a taking of an incorporeal tenement will confer a settlement.

The Court therefore directed an inquiry to be made whether any interest in the tolls had passed from the corporation under their seal to the pauper, or any person under whom he might claim: and in the mean time they made an order nisi for quashing the order of Sessions, if no such fact existed. And after inquiry made, it being reported to the Court on a subsequent day that no other instrument had been executed except a bond given by the pauper to the corporation with sureties for the rent, the Court said that could convey nothing *from* the corporation: and the rule stood for quashing the order of Sessions.

Order of Sessions quashed.

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Every indictment must contain a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy. But except in certain cases where technical expressions, having grown by long use into law, are required to be used, the same sense is to be put on the words of an indictment which they bear in ordinary acceptation. And if the sense of any word be in ordinary acceptation ambiguous, it shall be construed according as the context and subject matter require it to be, in order to make the whole consistent and sensible. The word *until* may therefore be construed either exclusive or inclusive of the day to which it is applied, according to the context and subject-matter. Therefore, where, in an indictment on the stat. 33 *Geo.* 3. *c.* 52. *f.* 62., prohibiting *officers* of the *East India* Company, *residing in* India, from receiving presents, the information charged that the defendants, being *British* subjects, on the 1st of *January* 1794, and from thence for a long time, to wit, *until* the 29th of *November* 1795, held certain offices under the Company, and *during all that time resided* in the *East Indies*; and that *whilst* they held the said offices *as aforesaid*, and *whilst* they resided in the *East Indies as aforesaid*, to wit, *on the 29th of* November 1795, they received certain presents; held that the context shewed that the word *until* was to be taken *inclusive* of the 29th of *November* 1795. But that if it had been incapable of receiving an inclusive construction, the words under the first, videlicet, "*until the 29th of* November 1795," could not have been rejected as surplusage: for that can never be where the allegation is sensible and consistent in the place where it occurs, and not repugnant to *antecedent* matter, *though laid under a videlicet*, and however inconsistent with an allegation *subsequent*.

AN information was filed by the Attorney-General against the defendants, framed on the stat. 33 *Geo.* 3. *c.* 52. *f.* 62. (*a*), for receiving bribes from certain natives of *India*, whilst the defendants held certain offices in the service of the *East India* Company, which set forth that *J. Stevens*, being a *British* subject, on *the* 1st of *January* 1794, and for a long time thence next ensuing, to wit, *until* the 29th of *November* 1795, held and exercised the office of supervisor of the province of *Malabar* in the *East Indies*, under the *East India* Company, and *during all that time* resided in the *East Indies*: and that the defendant *Agnew*, being a *British* subject, on the said first of *January* 1794, and for a long time thence next ensuing, to wit, *until* the 29th of *November* 1795, held and exercised the office of commercial resident at *Calicut* in the *East Indies*,

(*a*) It is thereby enacted, "That the demanding or receiving any sum of "money or other valuable thing as a gift or present, or under colour thereof, "whether it be for the use of the party receiving the same, or for or pretended to be for the use of the said Company, or of any other person whatsoever, by any *British* subject *holding or exercising any office* or employment "under his Majesty or the said United Company, *in the* East Indies, shall be "deemed extortion and a misdemeanor at law," &c.

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under the ſaid United Company, and *during all that time* reſided in the *Eaſt Indies*. And that the defendant *Stevens*, ſo being a *Britiſh* ſubject as aforeſaid, *whilſt he held and exerciſed the ſaid office* of ſupervisor of the province of *Malabar* in the *Eaſt Indies* aforeſaid, under the ſaid United Company as *aforeſaid*, and *whilſt he reſided* in the *Eaſt Indies as aforeſaid*; and the defendant *Agnew*, ſo being a *Britiſh* ſubject as aforeſaid, *whilſt he held and exerciſed the ſaid office* of commercial reſident at *Calicut* in the *Eaſt Indies*, under the ſaid United Company *as aforeſaid*, and *whilſt he reſided* in the *Eaſt Indies as aforeſaid*, did, within ſix years before the filing of this information, to wit, on the 29th of *November* 1795, in the *Eaſt Indies* aforeſaid, receive of and from a certain perſon in the *Eaſt Indies* aforeſaid, called the Samoory, otherwiſe the Zamorin Rajah, 100,000 rupees, being of the value of 12,500*l*., as a gift and preſent, againſt the form of the ſtatute, &c.; whereby, and by force of the ſtatute, they the defendants committed extortion, and, by force of the ſaid ſtatute, forfeited to the king the ſaid ſum of 12,500*l*., being the value of the ſaid R. 100,000 ſo received by them as aforeſaid.

In *Eaſter* Term laſt a motion was made in arreſt of judgment, for want of a ſufficient averment in the information that the defendants were *Britiſh* ſubjects *reſiding in* India, *and holding employments there* under the Crown or the *Eaſt India* Company *at the time of the offence committed* in receiving the preſents. And it was contended, 1ſt, that every information muſt contain an averment of the time of any material fact alleged in it. 2dly, That if time be alleged to any material fact which is inconſiſtent with other facts and times alleged in the information, which makes the information repugnant to itſelf, it is

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void. 2 *Hawk. ch.* 25. *s.* 77. That here the residence and service of the defendants in *India* is laid to have continued *until* the 29th of *November* 1795, which word *until* was exclusive of that day, and the receipt of the presents by them is alleged to have been *on* the said 29th of *November*, and consequently after their residence in *India* and service under the Company there had ceased, when they were no longer within the prohibition of the act of the 33 *Geo.* 3. *c.* 52. *s.* 62. And *Rex* v. *Gamlingay* (a) was cited, where the word *unto*, in an indictment describing a road as leading *unto* such a place, was holden to be exclusive of that place. And the word *until* was argued to have the same meaning as to *time* which *unto* had as to *place*.

The Attorney-General, *Erskine*, *Garrow*, *Adam*, *Wood*, and *Abbott* shewed cause against the rule; and admitting that it was essential to the completion of the offence created by the act of parliament, and to the validity of the charge in the information, that the defendants should appear to have been *British* subjects resident in *India*, and holding their employments stated at the time of the offence committed, and that a certain day should be stated for the commission of it, they contended that these facts did appear with sufficient certainty on the day when the offence is alleged to have been committed. For first, the word *until* is in itself ambiguous, and is used indifferently either inclusively or exclusively, according to the subject matter or context, and that, not only in common parlance, (of which they gave many familiar examples,) but in legal language, and by good writers. 5 *Com. Dig. Temps*, 498. *Dies Juridici C.* 2, 3. says, that " *Easter* term anciently began *Oct. Pascha*, &c. but afterwards the beginning was

(a) 3 *Term Rep.* 513.

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deferred *till Quinden. Paschæ*, &c. when it now begins." An adjournment *until* such a day is necessarily inclusive of that day. The stat. 51 *H.* 3. *st.* 3. concerning general days in a writ of dower, directs that if the writ do come in *Octavis Michaelis*, day shall be given *in* craftino animarum, which is translated *until* craftino animarum, &c. The form of a commitment of a felon to the assizes is "*until* the next gaol delivery (*a*)." In proceedings for murder the indictment charges the stroke on a certain day, and that from that day the deceased languished and languishing did live *until* another day, on which day he died, &c. (*b*): the words in Latin were, languebat usque ad decimum nonum diem mensis Decembris anno 28, quo quidem decimo nono die, &c. obiit, &c. (*c*). And the sentence of the law is to be hanged *until* he be dead. In all these instances *until* must be taken inclusively. Nothing is more frequent in writers than to add the word *inclusive* or *exclusive* after the word *until*; which shews that it is capable of either meaning; and yet if it were necessarily *exclusive*, the addition of *inclusive* after it would be manifestly repugnant and absurd. If then it may be used inclusively without any addition to it, and must necessarily be taken to be so used if the word *inclusive* be added to it, the same meaning may as clearly be manifested from the context, if the subject matter to which it is applied necessarily require it to be so understood in order to make the whole intelligible and consistent. Now here the context is equivalent to the addition of the word *inclusive*; for the offence is alleged to have been committed *whilst the defendants*

(*a*) 1 *Burn's Just.* tit. *Commitment*, *pl.* 2. at the end.

(*b*) *Carney's* case, O. B. *Sep.* Sess. 1803. *Wall's* case, O. B. *January* 1802. *Earl Ferrers'* case, 10 *St. Tr.* 481.

(*c*) *Haydon's* case, 4 *Rep.* 41.

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defendants held and exercised the said offices, under the Company *as aforesaid*, and *whilst they resided in the* East Indies *as aforesaid*, to wit, *on the 29th of* November 1795, it having been before alleged that they resided in the *E. I.*, and held their offices *until* the 29th of the same *November*. That shews that the word *until* is used there inclusively of the 29th of *November* 1795, even if the very nature of the charge did not, as it necessarily must, require that interpretation to make it available. Supposing therefore that *until* might in its original signification have been as much exclusive as applied to time, as *unto* has been determined to be as to place, yet usage which gives the jus et norma loquendi has now warranted the use of it either way. As in *Pugh* v. *The Duke of Leeds* (*a*), the word *from*, though in strictness exclusive, was yet holden to be either exclusive or inclusive according to the context and subject matter; and that the Court would give it that construction in an instrument as would best effectuate the apparent intention of the parties. And here it cannot be doubted but that *until* was used inclusively by the drawer of this information. In questions of settlement nothing is more common than hirings *from* Michaelmas in one year, *to* or *until* Michaelmas in the next; and these have been always construed to include one of the *Michaelmas* days, so as to complete the hiring for a year (*b*). The word *to* (*c*) is used sometimes inclusively, as in the form prefixed to the statutes at the beginning of a sessions of parliament, after prorogation, the style is, " at a parliament began and holden at *Westminster* the 12th of *July*,

(*a*) *Cowp.* 714.

(*b*) *R* v *Sydersftone cum Barmer*, *E.* 17 *Geo.* 3. *Cald.* 19.; and 3 *Burn's Just.* tit. *Poor*, *Sett. by Service*; and *R.* v. *Navestock*, *Burr.* S. C. 719.

(*c*) Vide note, post. p. 256.

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&c. and from thence continued by ſeveral prorogations *to* the 20th of *November*," &c. This deſcribes a ſeſſions opened *on* the 20th of *November*. In *R.* v. *Horne* (*a*), Lord C. J. *De Grey* referring to Lord *Coke*'s definition of certainty, ſays, that the laſt ſort, namely, "a certainty to a certain intent in every particular," is rejected in all caſes, as partaking of too much ſubtlety. None of the inſtances of impoſſible, uncertain, or repugnant allegations of time in indictments, which are referred to in the margin of *Hawkins*, apply to this caſe. That of *Moor*, 555. was an allegation of a murder committed on the 31ſt of *June*, which was an impoſſible day. In *Raſt. Entr.* 263. the indictment laid the felony on a day not then come. Another reference is to the year-book, 2 *H.* 7. 7. *pl.* 22 where an indictment for felony charged that two ſeveral perſons on two ſeveral days ſtole the goods. all theſe were no doubt defectively charged. The only other reference to this branch is to 2 *Hawk c.* 23. *ſ.* 88., where a mortal ſtroke being alleged to be given on the 10th, and the death on the 20th of *December*, an allegation in the concluſion, that the defendant murdered the deceaſed on the 10th, would of courſe be clearly repugnant to the allegation of the death on the 20th. But *Hawkins*, in *ſ.* 89. ſtates it to have been holden, "that an allegation of the day primâ facie ſomewhat uncertain *may be holpen by the apparent ſenſe of the whole*," of which he proceeds to give an inſtance. But ſuppoſing the word *until* to be neceſſarily *excluſive*, yet the words "*until* the 29th of *November* 1795" being laid under a *viz.* may be rejected as ſurpluſage, the allegation being inconſiſtent with what follows, namely, that the defendants did on the 29th of *November* 1795, and whilſt

(*a*) Cowp. 682.

they

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they refided in *India* and held their employments, receive the prefents. Then, rejecting thofe words, the information will read thus; "that *J. S.* being a *Britifh* fubject, on the 1ft of *January* 1794, and for a long time thence next enfuing, held and exercifed the office, &c.; and that whilft he held and exercifed the office, &c., and whilft he refided in the *Eaft Indies*, &c. as aforefaid, to wit, on the 29th of *November* 1795, he received the prefents," &c. In *Jonfon* v. *Meers* (*a*), it was refolved that where matter comes after a fcilicet which is repugnant to what went before, it fhall be rejected: and fo it was done in *Jones* v. *Williams* (*b*). [Lord *Ellenborough* C. J. Here the repugnancy is not to *antecedent* but to *fubfequent* matter.] There can be no difference in principle whether the repugnant matter be before or after the fcilicet, for the whole indictment muft be conftrued together.

Dallas, *Gibbs*, and *Torkington*, in fupport of the rule, contended, 1ft, that *until* according to its natural and legal import was a word of *exclufion*. It is the fame in refpect of *time* as *unto* is in refpect of *place*; and both mean *to*. And they mentioned various inftances in common parlance where thofe words muft be taken in an exclufive fenfe. The form of the indictment in murder proves nothing to the contrary: for the deceafed may languifh to the laft moment of one day, and die on the next, which would verify the allegation there ufed. *Rex* v. *Gamlingay* (*c*) is in point, that the fynonimous word *unto* is *exclufive* of place. And in *Nichols* v. *Ramfden* (*d*) it was holden, even in the cafe of a civil action, that *until* was exclufive as to time; for there a releafe of all tref-

(*a*) 12 *Mod.* 579.
(*b*) *Hardr.* 3.
(*c*) 3 *Term Rep.* 513.
(*d*) 2 *Mod.* 280.

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passes *usque ad* the 24th of *April* was deemed not to include that day. And it was admitted on all hands that in pleading the word *usque* was generally *exclusive*; and the majority of the Court said, that in a release of all demands *till* the 26th of *April*, a bond dated that day is not released: and so it was resolved in *Newman* v. *Beaumond* (a). Then a single instance of a wrong translation of the word *in* (*in* crastino animarum) rendered *until* instead of *upon*, in the stat. 51 *H.* 3. *st.* 3. will not vary the legal understanding of the word. 2dly, Cases on contracts, such as settlement cases, do not apply; for they are to be construed according to the apparent intention of the parties, to be collected from the subject matter of the contract; and in *R.* v. *Navestock* (b) Lord *Mansfield*, in order to construe the word *till* as inclusive of *Michaelmas* day, resorted to the custom of the country. So *Pugh* v. *The Duke of Leeds* turned on the construction of a contract, and the intention of the parties. But in an indictment nothing can be taken by intendment or implication, but every material fact must be positively alleged with a certain time and place. 3dly, Supposing the word *until* to be so far equivocal as to be capable in a criminal charge of receiving an inclusive interpretation according to the subject matter; yet if nothing appear to give it such a precise meaning, it must be construed exclusively according to its natural and legal import: and here nothing of that sort appears; for the subject matter is, that the defendants were in office in *India* from the 1st of *January* 1794 *until* the 29th of *November* 1795; and nothing can be collected from thence, even if it were a contract of hiring and service from the one period to the other, to shew that *until* was inclusive of the last-mentioned day.

(a) *Owen*, 50. (b) *Burr. S. C.* 719.

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No presumption can be made either way, as in cases of settlement, where if the hiring be general or equivocal, the legal presumption is that it was for a year. Then the subsequent allegation, that the offence was committed while the defendants were in office and resident in *India*, is an independent allegation, not connected by any word of reference to the preceding time alleged, as by the word *so* resident, or during *the* SAID *time* while, &c.; for the words *as aforesaid* refer only to the fact of holding the offices under the *East India* Company. It is therefore no explanation of what goes before, but a contradictory allegation of time; which cannot avail unless the former be rejected. But, 4thly, the words, "*until* the 29th of *November* 1795," being in themselves sensible and apposite in the place where they are used, cannot be rejected as surplusage merely because they are under a *videlicet*. In *Stukeley* v. *Butler* (*a*), Lord C. J. *Hobart* speaking of the use of a videlicet, says, that "it is *clausula ancillaris*, a kind of handmaid to another clause, and to deliver her mind and not her own; and therefore it is a kind of *interpreter*. Her natural and proper use is to particularise that that is *before* general, &c., or to explain that that is doubtful or obscure. First, it must not be contrary to the premises, &c. Next, it must neither increase nor diminish; for it is not in the nature of it to give of itself. But on the other side I grant, that a *viz.* may work a restriction where the *former* words were not express and special, but so indifferent that they may receive such a restriction without apparent injury," &c. So in *Skinner* v. *Andrews* (*b*), it was agreed in argument that a videlicet which is repugnant to the *preceding* matter is merely void; but where it is not repugnant to the preceding matter, but well agrees

(*a*) *Hob.* 172. (*b*) 1 *Saund.* 169, 170.

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with it, there it is a direct affirmation and shall be taken positively, as in the case last mentioned: and of this opinion was the Court. If then it be not repugnant to *preceding* matter, which it cannot be pretended here to be, it cannot be rejected as surplusage. And *Hawkins* so considers it in the place before cited (*a*); for there an instance is given of an appeal considered to be insufficient, because of repugnancy of the time when a defendant is charged to have abetted to the murder, viz. at the day of the death, and not of the stroke, which was laid at an antecedent day; and yet the date which gave rise to such repugnancy was laid under a *viz.* And so the rule is laid down in *Hayman* v. *Rogers* (*b*), that where that which comes under a *scilicet* is consistent with what went *before*, it is always looked on as an *averment*; but if it be inconsistent, it is rejected. Then 5thly, if the word *until* be in itself a word of exclusion, and be not explained by any word of reference from other parts of the information to have been used inclusively of the 29th of *November* 1795, and if that date being sensible cannot, though laid under a viz., be rejected on account of its repugnancy to any *subsequent* matter; then it will appear that the defendants only continued resident in *India* and in office up to a period exclusive of the 29th of *November* 1795, and the subsequent allegation that the offence was committed *while* they were in office and resident in *India*, viz. on the 29th of *November* 1795, is repugnant to what went before, and cannot be taken in contradiction to the former averment, that they only continued resident there in office till that day; and consequently the information is bad for repugnancy and uncertainty.

(*a*) 2 *Hawk. ch.* 23. *f.* 89. (*b*) 1 *Stra.* 232.

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After the *Attorney General* was heard shortly in reply, the Court said they would look into the cases cited. And on this day

Lord ELLENBOROUGH C. J. delivered judgment.

The defect which has been pointed out on this record is supposed to consist in a repugnancy, in alleging the offence which the defendants are charged to have committed on a particular day, "*whilst* they resided in the *East Indies*, and held their respective offices under the *East India* Company," (circumstances essential to the legal existence of such offence); which particular day does not fall within the period of time during which they had been before alleged to have resided and holden their offices, but without and beyond that period. It has been contended, on the part of the Crown, that this repugnancy, if it exist at all, may be cured by rejecting as surplusage the words under the *scilicet*, which contain that specification of time out of which the alleged incongruity afterwards arises, namely, the words "*until the 29th day of* November *in the year of our Lord* 1795." This defect, if it be one, cannot, as appears to me, be satisfactorily obviated in the manner suggested; for I do not find any authority in the law which warrants us in rejecting any material allegation in an indictment or information which is sensible and consistent in the place where it occurs, and is not repugnant to any *antecedent* matter, merely on account of there occurring afterwards, in the same indictment or information, another allegation inconsistent with the former, and which latter allegation cannot itself be rejected, as it is clear that the allegation of the *29th of* November 1795, stated as the day of committing the of-

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ſence, could not in this caſe be rejected without leaving the information wholly deſtitute of the neceſſary allegation of a particular day on which the offence was committed. If the *ſubſequent* repugnant matter could be rejected at all, (which in this caſe it cannot for the reaſon before given,) it might be ſo in favour of the *precedent* matter, according to what is ſaid by Lord *Holt* in *Wyatt* v. *Aland*, *Salk.* 325., "that where matter is nonſenſe by being contradictory and repugnant to ſomewhat *precedent*, there the *precedent* matter, which is ſenſe, ſhall not be defeated by the repugnancy which *follows*; but that which is contradictory ſhall be rejected." But here the matter required to be rejected is *precedent* matter, and is alſo in the place where it occurs ſenſible and liable to no objection whatever. But it is ſaid that there is no neceſſary repugnancy between the ſeveral allegations made on this record upon the ſubject of time, and that by conſtruing the word *until*, which occurs under the *ſcilicet*, (and upon which this queſtion turns,) as a word *incluſive* of the day to which it is adjoined and applied, and not *excluſive* of it, that the ground of the objection will be removed and the difficulty no longer exiſt. On the other ſide, however, it is contended, on the authority of *Nichols* v. *Ramſden*, 2 *Mod.* 280., and *Owen*, 50., that in legal proceedings the word *until* muſt have an *excluſive* ſenſe; and it has been argued, from the analogy it bears to the word *unto* (which word generally bears the ſame relation to *place*, which *until* does to *time*,) that the caſe of *The King* v. *Gamblingay*, 3 *Term Rep.* 313., is to be conſidered as an authority to the ſame effect. Theſe words, however, have obtained, in ordinary uſe, an equivocal ſenſe at leaſt, of which many inſtances were given at the bar; and I will mention two others. In Sir *Matthew Hale's Hiſtory*

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of the Common Law, p. 165., he ſays, "thus much ſhall "ſerve for the ſeveral periods or growth of the common "law *until* the time of *Edward* the 1ſt *incluſively*." An inſtance which proves that *until* ex vi termini does not imply *excluſion*; for if it did, the words above ſtated "*until* and *incluſively*" would involve a contradiction in terms; but that it may, from its context, receive an *incluſive* ſenſe. And in *Ayliffe's Parergon*. p. 152. it is ſaid, "The whole courſe or mode of judicial proceedings is "divided into three parts; the firſt laſts from the date of "the citation TO the joining of the iſſue, or conteſtation "of the cauſe *excluſively*; the ſecond continues TO a con-"cluſion in the cauſe *incluſively*; and the third endures "from a concluſion in the cauſe to the time of pro-"nouncing a definitive ſentence *incluſively*:" which *laſt inſtance* ſhews that the word *to* may be uſed either in an incluſive or excluſive ſenſe (*a*); and *both of them* prove that where exactneſs is wanted, and ambiguity is to be avoided, ſome words are neceſſary to mark and define the preciſe meaning of the words *to* and *until*, whether applied to time or other ſubject, and that without them the reader may be often uncertain in which ſenſe they are to be underſtood. If the word *until* occurred in a contract,

(*a*) There is a recent inſtance of the uſe of the words *to* and *from*, one or other of which muſt have been meant incluſively by the Legiſlature in the ſtat. 40 *Geo*. 3. *c*. 50., which enacts "that perſons entering any foreſt, &c. "in the night, *i. e.* between the hours of eight at night and ſix in the morn-"ing *from* the 1ſt of October *to* the 1ſt of *February*, or between the hours "of ten at night and four in the morning *from* the 1ſt of February *to* the 1ſt "of *October* in every year, having any gun, &c. to kill game," &c. ſhall be deemed rogues and vagabonds within the ſtat. 17 *Geo*. 2. *c*. 5. Now unleſs either the word *to* or the word *from* be underſtood incluſively, the offences provided againſt might be committed with impunity *on* the 1ſt of *October* and the 1ſt of *February*, which could not have been the intention of the Legiſlature.

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and the context or ſubject-matter evidently ſhewed that it was meant in an *incluſive* ſenſe, there can be no doubt but that the Court, in furtherance of ſuch intention, would ſo conſtrue it. This the caſes of *The King* v. *Naveſtock*, *Burr.* S. C. 719., *Rex* v. *Syderſtone cum Berner*, *Cald.* 19., and *King* v. *Skiplam*, 4 *T. R.* 490., fully ſhew. And in the caſe of *Wyatt* v. *Aland*, *Salk.* 325., which was a penal action for uſury by a common informer, and governed of courſe by the ſame rules of conſtruction which apply to indictments, Lord *Holt* ſaid, "*that where a matter is capable of different meanings*, that ſhall be taken which will *ſupport the declaration or agreement*, and not the other which would defeat it: in which *Powell* J., who differed on another point of the caſe, appears to have agreed: and the Court gave judgment in that caſe upon a conſtruction founded on the principle ſo laid down by Lord *Holt*. The matter muſt be *capable* of different meanings; for the Court cannot, in order to ſupport the proceeding in which the particular term occurs, arbitrarily give it a meaning againſt which the uſe, habits, and underſtanding of mankind would plainly revolt. But if it *be clearly capable* of different meanings, it does not appear to claſh with any rule of conſtruction, applied even to criminal proceedings, to conſtrue it in that ſenſe in which the party framing the criminal charge muſt be underſtood to have uſed it, if he intended that his charge ſhould be conſiſtent with itſelf. And this at leaſt we may ſuppoſe him to have intended. But in this caſe the meaning does not wholly reſt upon what muſt have been the intention of the perſon who filed this information, but upon the context; for the ſenſe in which the framer of this information actually uſes the word UNTIL in the firſt clauſe of it is explained by the next clauſe, wherein he ſays that "*whilſt the de-*

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fendant held the ſaid office" as "AFORESAID;" that is, "as he, the framer of the information, *had before ſtated*," namely, (as he explains himſelf,) *on the 29th of* November 1795. Or it may be put thus; "That *on the 29th of* November 1795, *whilſt* he ſo held the ſaid office *as before ſtated*;" which of courſe expreſſes that the framer of the information underſtood himſelf to have already ſtated that the defendant did hold the office on that day, and which could only have been ſo ſtated by him, in reſpect of his having uſed the word *until* in an *incluſive ſenſe*. In effect, by means of the word *aforeſaid*, the word UNTIL, uſed in the foregoing ſentence, is drawn down and incorporated in the ſubſequent one, where the whole of the words taken together impoſe by context on that word an *incluſive* ſenſe. Suppoſe, for the purpoſe of illuſtration, that inſtead of the words, "*as aforeſaid*," we ſhould ſubſtitute that part of the foregoing ſentence to which thoſe words relate; the ſentence will then ſtand thus: "And the ſaid "Attorney-General further ſaith, that the ſaid *James Stevens*, being a *Britiſh* ſubject, whilſt he held and exerciſed "the office of ſupraviſor of the province of *Malabar*, on "the 1ſt day of *January* 1794, and for the ſpace of time "next enſuing that day *until the 29th day of* November, "*on the 29th day of* November did receive," &c. Or ſuppoſing it to be read thus: "That the ſaid *James Stevens*, "being a *Britiſh* ſubject, *on the 29th day of* November "1795, *whilſt* he held and exerciſed the office of ſupra- "viſor of the province of *Malabar* for the time next enſu- "ing the firſt day of *January* 1794, *until the 29th day of* "November 1795, did receive," &c. Now in either of theſe ways of reading it, the ſenſe in which the word *until* is uſed will be found to be clearly *incluſive*; for unleſs it be ſo, the defendant could not, as before alleged,

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receive the present during the antecedently alleged time of holding his office. And that this is no forced or ftrained conftruction will appear from this, viz. that if the receipt had been alleged to have taken place on fome fpecified day between the 1ft of *January* and the 29th of *November*, the allegation " *whilft* he held the office of fupravifor," &c. would have been fuperfluous; inafmuch as it would have neceffarily refulted from a mere comparifon of dates that the receipt was *whilft he held his office.* Juft as in an appeal of murder, it is fufficient, where the ftroke is laid on one day, and the death on another, to allege the death to have happened on fome one day *which is within a year and a day of the ftroke*, without exprefsly averring that the party died within that particular period of time from the ftroke. And as the words " *whilft he held*," &c. are now ufed where the day of the receipt may be with reference thereto ambiguous, they can only be ufed with propriety as determining the 29th of *November* to be *inclufive*; becaufe the words, " *whilft* he held and exercifed the faid office," unconnected with any particular day, would of themfelves be infufficient; as the receipt could not be alleged generally to have taken place at a time between two days. As applied however to the day on which the receipt is here ftated to have taken place, they are not fuperfluous, but operate materially in marking that fuch day is to be confidered as *inclufive*, and for which purpofe alone they can be ufeful or effective. Every indictment or information ought to contain a complete defcription of fuch facts and circumftances as conftitute the crime, without inconfiftency or repugnancy: and except in particular cafes where precife technical expreffions are required to be ufed, there is no rule that other words fhall be employed than fuch as are in ordinary ufe; or,

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that in indictments or other pleadings a different ſenſe is to be put upon them than what they bear in ordinary acceptation. And if, where the ſenſe may be ambiguous it is ſufficiently marked by the context, or other means, in what ſenſe they are intended to be uſed, no objection can be made on the ground of repugnancy, which only exiſts where a ſenſe is annexed to words which is either abſolutely inconſiſtent therewith, or being apparently ſo, is not accompanied by any thing to explain or define them. If the ſenſe be clear, nice exceptions ought not to be regarded: in reſpect of which Lord *Hale* (*a*) ſays, that "more offenders eſcape by the over eaſy ear given "to exceptions in indictments than by their own inno-"cence, and many heinous and crying offences eſcape "by theſe unſeemly niceties, to the reproach of the law, "to the ſhame of the government, and to the encourage-"ment of villainy and the diſhonour of God." Upon the whole, it appears to us that the word "*until*" is capable in this caſe of receiving an *incluſive* meaning: and that not only the preſumed intention of conſiſtency on the part of the framer of the information requires that the word ſhould be thus underſtood, but that the context immediately connected with the words "*whilſt*" and "*as aforeſaid*" warrant us in adopting this meaning of it. And which meaning ſo adopted by us removes the whole ground of the repugnancy ſuppoſed to exiſt in this information.

Rule diſcharged.

(*a*) 2 *Hale's P. C.* 193.

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POSTAN *against* STANWAY, Executrix.

Wednesday, June 6th.

Where in assumpsit the defendant pleaded the general issue and the statute of limitations to the whole sum demanded, and as to part of it that the promises were made by the defendant's testator and one *A. B. jointly*, which *A. B.* survived the other, and is still living; and this last issue was found at the trial for the defendant, and the other two issues for the plaintiff, who thereupon had judgment for the rest of his damages and costs; held that the defendant was not entitled to have the costs of the issue found for her deducted from the costs of the trial which the plaintiff was entitled to on the issues found for him: aliter where all the *issues at the trial* are found for the defendant, but the plaintiff has judgment upon demurrer, and recovers damages on a writ of inquiry.

LORD ELLENBOROUGH C. J. delivered the opinion of the Court in this case, after time taken to consider of it.

This was a rule obtained by the defendant, calling on the plaintiff to shew cause why the Master should not be directed to review his taxation and to tax for the defendant her costs of the issue found for her. It was an action of assumpsit, to which the defendant pleaded, 1st, the general issue to the whole; 2d, the statute of limitation to the whole; 3d, as to so much of the promises and undertakings in the declaration mentioned as relate to 15*l.* 15*s*, part of the several sums therein mentioned, that such promises as to the said 15*l.* 15*s.*, part, &c. were made by her testator and one *Hassels* jointly, and which said *Hassels* survived the testator. The replication joined issue on the two first pleas; and to the last plea replied that the promises as to the said 15*l.* 15*s.* were made by the testator solely, and not by him and *Hassels* jointly; and issue thereon. On the trial a verdict was found for the plaintiff on the two first issues, and for the defendant on the last issue; so that on the record the plaintiff has a judgment to recover the damages found for him by the jury with costs. The question made in this case does not turn on the stat. 4 *Ann. c.* 16. *s.* 4 & 5. which allows double pleas, but which does not give to a defendant any right to costs other than he had before: it must therefore be considered in the same manner as if there had not been any double plea; but as if to a declaration in assumpsit the defendant had pleaded specially as to part of the

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plaintiff's demand, and the general iſſue as to the reſidue; and the iſſue as to part had been found for the defendant, and the general iſſue as to the reſidue had been found for the plaintiff. As in the common caſe where the defendant pleads non aſſumpſit as to all but a particular ſum, 5*l.* for inſtance, and as to that ſum a tender; and iſſue on the tender: and on the trial the tender is found for the defendant, but that the ſum tendered was not ſufficient; by which the plaintiff has a verdict on the general iſſue, and judgment for his damages and coſts. In ſuch caſe, which is a common one, the Maſter informs us that there is not an inſtance of the coſts of the iſſue on the plea of tender ever having been taxed for the defendant. The ſtat. of *Glouceſter*, 6 *Ed.* 1. *c.* 1. gives the plaintiff coſts in all caſes where the party is to recover damages. The ſtat. 23 *H.* 8. *c.* 15. gives the defendant coſts in certain actions where the plaintiff after appearance of the defendant is nonſuited, or *verdict paſs by lawful trial* againſt the plaintiff. And the ſtat. 4 *Jac.* 1. *c.* 3. gives the defendant judgment to recover his coſts in any action whatever wherein the plaintiff or demandant might have coſts (in caſe judgment ſhould be given for him), in caſe of the plaintiff being nonſuited, or *verdict* paſſing by any lawful trial againſt him. Many caſes have occurred in which the queſtion has been made both in this court and the Common Pleas, whether a defendant were entitled to any coſts where, there being ſeveral counts in a declaration, the plaintiff has obtained a verdict upon one only: and it has been uniformly holden, that in ſuch caſe coſts ſhall not be taxed for the defendant on ſuch counts as may have been found for him; not only in caſes where the ſubſtantial cauſe of action is the ſame in all the counts, only varied by the manner of ſtating it; ſuch are *Bridges*

v. *Ray*.

v. Raymond, 2 *Black.* 800. *Norris* v. *Waldron*, 2 *Black.* 1199: [These were in *C. B.* In *B. R.* the practice is the same, with this difference only, that in *C. B.* they tax costs for the plaintiff on the whole declaration, as well on the counts on which he succeeds as on the counts found for defendant; but here the costs are taxed for the plaintiff on such counts only on which he obtains a verdict, and no costs are taxed on the other counts found for defendant:] But also in another class of cases which comes nearer to the present case; viz. where to different counts of a declaration there have been different pleas, and issues on those pleas; and one or more found for the plaintiff, and the others for the defendant; in such case it has also been determined that the defendant shall not have costs taxed on the issues found for him. In *Lloyd* v. *Day*, in *C. B.*, *Barnes*, *qto.* 149. to two counts for different trespasses in different places, the defendant pleaded several justifications; and on trial all the issues were found for the defendant, except an issue on not guilty to a new assignment made by the plaintiff, which was found for the plaintiff; and on argument the Court held that the plaintiff was entitled to 1*d.* damages and 1*d.* costs, the jury having found the verdict for him with 1*d.* damages; and that the defendant was not entitled to any costs. Another case is mentioned in *Buller's Ni. Pri.* 335. of *Mich.* 4 *Geo.* 3. in *C. B.* In trespass the defendant pleaded three different justifications to three different counts, and on issue joined had a verdict for him on two, and against him on the third: on motion, this was holden not to be a case within the stat. 4 & 5 *Ann. c.* 16. and that the plaintiff was entitled to costs on the whole declaration. In *Sir J. Astley* v. *Young*, 2 *Burr.* 1232. the declaration consisted of two counts; the defendant demurred to one, and

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obtained judgment thereon; and pleaded to the other: and on trial of the iſſue the verdict was for the plaintiff. This was a caſe of ſingle pleas at common law. The Court were all, except Mr. Juſt. *Foſter* who was abſent, unanimous that in the preſent caſe the plaintiff was entitled to coſts upon his verdict, and the defendant to none upon his demurrer: for that the plaintiff, having prevailed upon one of his counts, had a right to have his coſts upon that count, without any deduction on account of the defendant's having gotten judgment upon his demurrer to the other count. *Butcher* v. *Green*, (1ſt edit. *Dougl.* 652. *B. R. E.* 21 *Geo.* 3.) was an action on the caſe, in which the declaration contained one count in trover, and another for words: plea not guilty to the firſt count, and a juſtification to the ſecond count: verdict for the plaintiff on the count in trover, and for the defendant on the other count. The Court held that the defendant ſhould not have coſts taxed on the iſſue found for him. *Buller* J. ſaid, the practice of the Court is uniform not to allow the defendant coſts in caſes of this ſort. From theſe authorities the practice appears to have been ſettled in both courts, that wherever a plaintiff ſucceeds on a trial in any part of his demand divided into different counts in his declaration, whether the defendant have pleaded one plea to all the counts jointly, or pleaded to them ſeparately, and ſeparate iſſues have been joined, on ſome of which he has ſucceeded; yet he has never been allowed coſts on that part of the plaintiff's demand which has been found againſt the plaintiff. And the ſame rule has prevailed where a defendant has ſucceeded on a demurrer as to part of the plaintiff's demand. And it ſeems difficult to make a diſtinction in favour of the defendant, between a caſe where the plaintiff himſelf ſevers his demand by dividing

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it into two counts in his declaration, and where the defendant fevers it by his plea, as he has done in the prefent cafe. The cafes relied on by the defendant are three late cafes; *Day* v. *Hanks*, 3 *T. R.* 654. 30 *Geo.* 3. *Burrows* v. *Rulls*, *C. B.* 32 *Geo.* 3. and *Griffiths* v. *Davis*, 8 *T. R.* 466. which are diftinguifhable from the prefent cafe in this refpect, that in them *the only iffue joined was found for the defendant*, and there was *no iffue* or trial *on which the plaintiff fucceeded*. For in thofe cafes the defendant had pleaded to part only of the plaintiff's demand, and let judgment go by default as to the refidue; and the only iffue joined, and on which the parties went to trial, was found for the defendant; the plaintiff having fucceeded only on the inquiry of damages, and the defendant on the trial of the iffue. On this diftinction the courts feem to have founded themfelves in relieving the defendant from what appeared to them a hardfhip, which by the practice of both courts he was fubject to in cafes falling within the former decifions. But as the prefent cafe falls within the former authorities which have been long eftablifhed, there having been *feparate iffues joined and tried on different parts of the plaintiff's demand*, on one of which he has obtained a verdict, and does not fall within the laft clafs of cafes I have mentioned; the defendant not having admitted any part of the plaintiff's demand by letting judgment go by default, but by denying the whole, having compelled him to join iffue, and go to trial on that iffue as to part; we are of opinion that the fettled practice hitherto obferved muft prevail in this cafe, and that the defendant is not entitled to have any cofts taxed for her. The confequence is that

The Rule muft be difcharged.

Efpinaffe fhewed caufe againft the rule; and

Wigley fupported it.

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CHARNLEY *against* WINSTANLEY and his Wife.

A declared in covenant against *B.* and her husband, for that *B.*, before her intermarriage, covenanted with *A.* by deed to leave certain accounts in difference between them to arbitration, and to *abide* and perform the award provided it were made during [illegible] ves. And *A.* protesting that *B.* had not, before her intermarriage, performed her part of the covenant, averred that *after* making the indenture and *the intermarriage of the defendants*, the arbitrator *awarded* B. to pay *A.* a certain sum; and then alleged a breach for non-payment of such sum. After verdict on non est factum pleaded; held that upon this declaration it must be taken that *B intermarried* after the submission and *before* the *award* made; in which case, although the plaintiff could not recover upon the breach assigned *for non payment of the sum awarded*, because *the marriage* was a *countermand* to the *authority of the arbitrator*; yet as by the marriage itself *B.* had by her own act put it out of her power to perform the award, the covenant to *abide* the award was broken; and therefore judgment could not be arrested on the ground that the marriage was a revocation of the arbitrator's authority, and that so the plaintiff could not recover *as for a breach by non-performance of the award.*

THE plaintiff declared in covenant, that by indenture under seal dated 7th of *December* 1793, between the plaintiff of the first part, the defendant *Frances*, by her then name of *Frances Brown* spinster, administratrix of *John Brown*, of the second part, and *W. R.* of the third part, the plaintiff and the said *Frances* agreed to leave to *W. R.* to collect certain debts of the late partnership between the plaintiff and the defendants' intestate, and to settle all differences, by leaving to *W. R.* the adjustment and final settlement of such accounts: they therefore conveyed all the debts and effects of the partnership to *W. R.* the arbitrator. And the plaintiff and the said *Frances* covenanted with each other that they would well and truly obey, *abide* and perform the award of *W. R.* in the premises, provided the award should be made during the natural *lives* of the plaintiff and the said *Frances.* The plaintiff then stated, that though he had performed his part of the indenture, yet *protesting* that the defendant *Frances before her intermarriage did not observe* and perform, &c., and that the defendants since their intermarriage have not observed, performed or fulfilled any thing in the said indenture contained on the part of the said *Frances;* he averred, that *after the making of the said indenture and the intermarriage of the defendants*, and during the joint lives of him, the plaintiff, and the said *Frances*, viz. on the 22d of *July* 1803, *W. R.* duly *made his award*

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concerning the premiſes, and awarded the ſaid *Frances* to pay to the plaintiff a certain ſum on the 10th of *Auguſt* then next; of all which premiſes the defendants had notice, &c. The plaintiff then alleged, as a breach, that the defendants did not on the ſaid 10th of *Auguſt*, and after making the award, pay the ſum awarded; contrary to the ſaid indenture and the covenant of the ſaid *Frances*; and ſo the plaintiff ſays, that the defendants have not, nor hath either of them kept with him the covenant of the ſaid *Frances*, although requeſted, &c. To this the defendants pleaded non eſt factum; and after verdict for the plaintiff it was moved in arreſt of judgment, that the marriage of the defendant *Frances* after entering into the covenant to ſubmit to arbitration, and before any award made, was a revocation of the arbitrator's authority, and conſequently there could be no breach of an award which he had no authority to make.

Topping and *Scarlett* ſhewed cauſe againſt the rule, and diſtinguiſhed between the ſubmiſſion of a feme to arbitration by *parol* and by *deed*; *Bro.* tit. *Arbitrement*, 45. *b. pl.* 35.; that however her ſubſequent marriage before any award made might be a revocation of the former, it was not of the latter. The anonymous caſe in Sir *W. Jones*' *Rep.* 388., which is the only direct authority in ſupport of the revocation, was probably a ſubmiſſion by *parol*. And though the caſe of *Samin* v. *Norton et Uxor*, which was a ſubmiſſion by bond, may ſeem to be againſt that diſtinction, as reported by *Keble* in his 2d vol. (*a*), yet it appears from the report in the 3d vol. (*b*) of a ſubſequent date, that the Court conceived that the plea of intermarriage before the award made was no anſwer to the action on the

(*a*) 2 *Keb.* 865. 877. (*b*) 3 *Keb.* 9.

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the bond; and finally the defendants agreed to enter into a new bond. But even admitting the marriage to be a revocation of the arbitrator's authority, though conferred by deed, yet *Vynior*'s cafe (*c*) is an authority in point to fhew that fuch a revocation by the party's own act is no difcharge of her exprefs covenant to *abide* the award; but her having thereby incapacitated herfelf from *abiding* the award is a breach of fuch covenant, for which fhe is liable in this action, her hufband being joined for the fake of conformity. [In anfwer to a doubt ftarted by the Court whether the breach were properly alleged to meet the laft view of the cafe, and whether the breach fhould not have been fpecifically affigned that the defendant *Frances* did not *abide* the award, by intermarrying with the other defendant, and thereby incapacitating herfelf from performing it;] they anfwered, that though fuch a breach were not formally affigned, and the declaration might poffibly have been bad on fpecial demurrer, yet upon the whole of the count it did fufficiently appear that the defendant *Frances* had not *abided* the award, but had rendered herfelf incapable of abiding it; and the action is on the deed, and not on the award.

Park and *Richardfon*, contrà, relied on *White* v. *Gifford and others*, 1 *Roll. Abr.* 331. tit. *Authoritie*, E. *pl.* 4. as another authority in addition to the cafe in *W. Jones*, 388. to fhew that marriage is a revocation of a prior fubmiffion to arbitration by a feme; and faid that there was nothing in either of the books to warrant the diftinction fet up. Then taking that point pro conceffo, it cannot in reafon be a breach of a covenant, to *abide* an *award*, not to pay a fum of money directed by an award which the arbitrator had

(*c*) 8 Rep. 81. *b.*, and vide 4 *Rep.* 61. *b.*

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no authority to make; and the non-payment of the money is the only breach assigned. Supposing the fact of marriage before any award made could be deemed a breach of such a covenant, yet it ought to have been specifically assigned as a breach, so that issue might have been taken upon it; but it is not alleged as a *fact*, but merely stated collaterally by way of introduction. If meant to have been insisted on as a revocation of the authority, it should have been pleaded as such, in the same manner as the revocation of the authority was pleaded in *Vynior*'s case, in order to shew in what manner the defendant had not *abided* by the award. As it now appears, non constat that the marriage may not have been with the consent of the plaintiff, and then it would be no breach. [*Lawrence* J. The only matter put in issue was, whether this were the deed of the defendant. If the defendants had meant to insist that the marriage was no breach of the covenant, because had with the consent of the plaintiff, it was open to them to have pleaded such consent. There is nothing in the form of the declaration to have shut them out of such a plea. Lord *Ellenborough* C. J. There is a sufficient statement to shew the fact of marriage before the award made, and that is primâ facie a breach of the covenant to *abide* the award; because by that act the defendant *Frances* disabled the arbitrator from making any award. Then if the defendants would insist on any matter to shew that the marriage was not a breach, it must come from them.] Though marriage operate in law as a countermand to the arbitrator's authority from his inability to bind a feme covert without her husband by his award; yet the act of marriage, being lawful, is not in itself a breach of the covenant; for then such a covenant would operate in restraint of marriage generally, extend-

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ing as it does to an award made at any time during the lives of the parties, which operation the law will not admit of. *Lowe* v. *Peers* (*a*). [*Lawrence* J. obferved, that this argument would go the length of faying that a woman who covenants when fingle may always break her covenant with impunity by marrying.]

Lord ELLENBOROUGH C. J. If this had come on upon a fpecial demurrer as for a defective allegation of the breach of covenant by marrying, there would have been good ground for the defendants' objection to the manner of declaring; for here the breach of covenant arifing out of the facts fhewn by the declaration is the fact of the defendants' intermarriage before any award made, by which the defendant *Frances* incapacitated the arbitrator from making any award to bind her, and thereby broke her covenant to *abide* the award of the arbitrator. But the plaintiff not relying on this, proceeds to fhew by way of breach that the defendant *Frances* did not pay the money awarded after fuch intermarriage. But notwithftanding the plaintiff has ftated his real gravamen informally, yet if upon the whole it appear that the defendant *Frances* has committed a breach of covenant, the judgment cannot be arrefted. Now here the plaintiff, protefting that the defendant *Frances* did not *before* her intermarriage obferve her part of the indenture, avers, that *after the making of the indenture, and the intermarriage of the defendants*, the arbitrator made his award. That is a fufficient allegation of the fact of the marriage being before the award, which conftitutes a breach of the covenant, to warrant us in giving judgment for the plaintiff on that ground. And this upon the principle, which we had occafion to

(*a*) 4 *Burr.* 2225.

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consider very fully in a late case (*a*); that however defective the pleadings, and however imperfect the prayer of judgment on either side may be, we are bound ex officio to give such a judgment as upon the whole record the law requires us to do.

GROSE J. We cannot arrest the judgment, if upon the whole record it appears that the defendant has committed a breach of the covenant declared on.

LAWRENCE J. The foundation of the motion to arrest the judgment is, that it appears that the defendant *Frances* intermarried with the other defendant before the award made, which it is insisted amounts to a revocation of the arbitrator's authority; but the marriage itself is a breach of the covenant to abide the award; and if the fact relied on so far appear as to lay a foundation for the motion, that breach must also appear on the face of the declaration. It is therefore inconsistent in the defendants to say that we cannot take notice of the marriage before the award made, which is the ground of the objection to the declaration in arrest of judgment.

LE BLANC J. declared himself of the same opinion.

Rule discharged.

(*a*) *Le Bret* v. *Papillon*, 4 *East*, 502.

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Thursday, June 7th.

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The demandant in a writ of right must allege in his count that his ancestor was seised *of right* as well as that he was seised in his demesne as of fee. *Qu.* Whether if one through whom title is derived be improperly stated to be *heir* to her brother, who it appears by the record had a son who survived him, and through whom title is properly derived, such erroneous appellation of the sister as *heir* to her brother be fatal.

AT the court of the manor and forest manor of *Gillingham* in the county of *Dorset*, holden on the 2d of *May*, 40 *Geo.* 3., *Thomas Dowland* prosecuted his writ of right close against *William Slade* and *Elizabeth* his wife, as follows:

"*George* the Third, &c. To Sir *T. Sykes*, Bart. lord of the manor of *Gillingham* in *Dorsetshire*, or his steward of the same manor, greeting—We command you, that without delay, and according to the custom of the manor aforesaid, you do full right to *Thomas Dowland* concerning 18 acres of land, &c. with the appurtenances, in the tything of *Bourton* in the manor aforesaid, which *William Slade* and *Elizabeth* his wife deforce him of, that we hear no more complaint for want of right. Witness ourself," &c. And thereupon the said *Thomas Dowland* makes his protestation to prosecute the same writ in the said Court, in the form and nature of a writ of right patent at the common law according to the custom of the manor aforesaid; and finds pledges to prosecute, &c. The record then set forth the command to the bailiff of the manor to summon the defendants on a given day; at which day "*Thomas Dowland* (by his attorney) demands against the said *W. S.* and *E.* 18 acres of land, &c. in the tything of *Bourton*, in the manor of *Gillingham*, in the county of *Dorset*, and within the jurisdiction of this Court; and whereof he says that *Thomas Gamlyn* was *seised in his demesne as of fee*, according to the custom of the manor aforesaid, in the time of peace, in the time of the Lord *George* the Second, late King of *G. B.*, &c. and within

60 years

60 years now last past, by taking the esplees thereof to the value, &c. and died thereof seised, leaving one *Elizabeth* his wife him surviving, and *from* the said *Thomas Gamlyn* the right to the said tenements with the appurtenances descended and came to one *William Gamlyn*, as *brother and heir* of the said *Thomas Gamlyn*, subject to the estate of free bench of the said *Elizabeth* therein, according to the custom of the manor aforesaid; and *from* the same *William Gamlyn* the right, &c. subject, &c. *descended* and came to one *Hannah Dowland*, as *eldest cousin and heir* of the said *Wm. Gamlyn*, according to the custom, &c. viz. *as eldest daughter and heir of* Hannah Ball, who was *the only sister and heir of one other* Thomas Gamlyn, who was *the father as well of the said first-mentioned* Thomas Gamlyn *as of the said* Wm. Gamlyn, which said *Elizabeth Gamlyn* died in the lifetime of the said *Hannah Dowland*; and *from* the said *Hannah Dowland* the right, &c. descended and came to one *Thomas Dowland*, the son and heir of the said *Hannah Dowland*, and from the said *Thomas Dowland*, the son of the said *Hannah Dowland*, the right, &c. descended and came to the said *Thomas Dowland*, the now demandant, as son and heir of the said *Thomas Dowland*, the son and heir of the said *Hannah Dowland*; and that this is right he the said *Thomas Dowland*, the now demandant, offers," &c. To this the defendants demurred generally, and judgment was given for the demandant in the manor and forest Court, to recover his seisin of the tenements, &c.

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The defendants thereupon prosecuted a writ of false judgment returnable in the Court of Common Pleas; and the sheriff in his return stated, that he had recorded the plaint in question, and then set out the whole of the proceedings at length, including those before mentioned;

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on which the following causes of false judgment were assigned; 1. That no seisin *of right* of the premises is in the count alleged and averred in *Thomas Gamlyn*, who is therein alleged to have been last seised, and from whom the demandant deduces his title; and that the right is in that count alleged to have descended to the several persons therein named in succession from the said *Thomas Gamlyn*, who for aught appears had no *right;* and that the title is attempted to be deduced to the demandant from an ancestor who is not alleged to have any right, but for aught appears might have been seised *of wrong*, and the *right* have been in those who were seised of and held the same premises since the death of the said *Thomas Gamlyn;* and that the root of the demandant's title is defectively and erroneously alleged. 2. That supposing the said *Thomas Gamlyn*, the person last seised, to have had any right, no right is deduced from him to the demandant, inasmuch as the said *Hannah Dowland* is in the said count alleged to be the *heir* of the said *William Gamlyn*, and the right to the premises to have descended to her as *the heir of* Hannah Ball, which *Hannah Ball* must therefore have *died before the said* William Gamlyn, or the said *Hannah Dowland* could not have been *heir to the said* William Gamlyn, or the right have descended from the said *William Gamlyn immediately* to the said *Hannah Dowland;* and yet the said *Hannah Ball* is in the said count stated to have been the *sister and heir of* Thomas Gamlyn *the father*, who must therefore have *died in the lifetime of* Hannah Ball, and to which said *Thomas Gamlyn* the father, *William Gamlyn* the *son*, who survived *Hannah Ball*, must have been *heir*, and to which said *Thomas Gamlyn* the father *Hannah Ball* never could have been *heir*, if it be true, as there alleged, that *Hannah Dowland* was *heir* to *William Gamlyn* at the time

time of his death, and that the right descended immediately from him to her. There was also a 3d cause of false judgment stated, (but this was not insisted on upon the argument in this Court,) viz. that no custom of the manor is alleged whereby it appears that eldest daughters and eldest female cousins are entitled to be *heirs* alone and exclusively of their younger sisters. The Court of Common Pleas, for the second cause above alleged, reversed the judgment of the Court below; upon which judgment of reversal a writ of error was brought in this Court, and the common error assigned.

This case was argued in last *Easter* term by

Abbott for the plaintiff in error, (the original demandant). As to the 1st error assigned, that *Thomas Gamlyn*, the ancestor from whom the demandant derives title, is only stated to have been "*seised in his demesne as of* fee," without adding, "*and of right;*" these words are not necessary, (though it was admitted that they are to be found in all the precedents of writs of right) (*a*); for it is not necessary to allege any matter in pleading, which cannot be traversed, and need not be proved; and the tenant cannot admit the *seisin*, and traverse the *right* to the seisin: and a wrongful seisin is sufficient to sustain a writ of right. Nor is it necessary to allege matter of law; and whether the seisin be of right or of wrong is a question of law and not of fact. Whatever the practice may have been, the necessity of it must be tried by referring to principles. In case for disturbance of a common way or other

(*a*) The words *et de jure* are omitted in one precedent only, which is in *Rastal*, tit. *False Judgment*, *pl.* 9. (the precedent which was followed in this case); but this was admitted to be a mistake; for on searching the roll, those words were found to be inserted.

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appurtenant to land, it is usual to say that the plaintiff was *lawfully* possessed of the land; yet that is not necessary. Indictments for murder always say, that the deceased was "in the peace of God and of our Lord the King," and yet that is not necessary to be alleged (*a*). The books which treat of the writ of right only say, that it is founded on a *seisin in fee simple* of a man or his ancestors; they do not say a *lawful* or *rightful* seisin. *Co. Lit.* 158. It can only bind between the parties. It is called a writ of *right*, not because it is founded only on the right, but because it is adapted to the recovery of it when all other possessory remedies fail. *Lit. s.* 514. says, that if the demy mark be not tendered, "the grand assize ought to be charged only to inquire of the *mere right*, and not of the *possession*," &c. The words, "which he claims as his right and inheritance," are not in any of the precedents of the writs in *Fitzherbert's Nat. Brev.*, or the Register, when directed to lords of manors, but only in the writs in *C. B.*; quia dominus remisit curiam. The statute of limitations, 32 *H.* 8. *c.* 2. speaks only of *seisin* or *possession*, not of *lawful* seisin. And *Lit. s.* 478. shews, that a wrongful seisin originating in a disseisin is sufficient to sustain a writ of right; as "if a man be disseised by an infant who aliens in fee, and the alienee dieth seised, and his heir entereth, the disseisor being within age, it is in the election of the disseisor to have a writ of *dum fuit infra ætatem*, or a *writ of right*, against the heir of the alienee." And this is confirmed by Lord *Coke's Comment*, *Co. Lit.* 278.*b*. The subject is resumed in *s.* 481; and in *s.* 482 another instance is put of a recovery upon a seisin acquired by wrong: "if he in the remainder had entered upon the tenant for life and disseised him, and after the

(*a*) *Heydon's* case, 4 *Rep* 41. *b*.

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tenant enter upon him, and after the tenant for life by ſuch recovery loſe by default and die, he in remainder may well have a writ of right againſt him which recovers, becauſe the miſe ſhall be joined only upon the mere right, &c., yet in this caſe the ſeiſin of him in the remainder was defeated by the entry of the tenant for life." Upon which Lord *Coke*, (*Co. Lit.* 280. *b.*) obſerves, "Here a diſſeiſin gotten by wrong, and defeated by the entry of him that right hath, is ſufficient to maintain a writ of right againſt the recoveror in this caſe." The caſe put by *Littleton* may be the very caſe here. For ſuppoſe *Thomas Gamlyn* the anceſtor, on whoſe ſeiſin the demandant counts to have had a remainder expectant on an eſtate for life, and to have entered on the tenant for life, and thereby acquired a wrongful ſeiſin, and to have been afterwards ouſted by him, and then have died; and then the tenant for life to have died; the count could not properly have been otherwiſe framed than it is. And if the count may be good in any ſuppoſable caſe, no advantage can be taken of it on demurrer or on error. One who has a wrongful ſeiſin may yet have more right than another. To ſhew that the tenant cannot admit the ſeiſin and traverſe the right, he cited *M.* 27 *Ed.* 3. *fo.* 85. *pl.* 26. and *Fitzh. Abr. Droit. pl.* 20. S. C., where *Thorpe*, C. J. ſaid, that the tenant ought to have denied the *ſeiſin*, and not to have acknowledged it; for when he acknowledged that, he acknowledged the right to it *per degrees*. The iſſue in this form of proceeding is only on the right comparatively; for the iſſue is that the demandant has *more* mere *right* than the tenant. And on this iſſue the tenant is to begin, unleſs he tender the demy mark, in order to put the demandant to prove the ſeiſin in the reign alleged in his

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count. There is a record in *Booth's Real Action* (*a*), of the form of the issue on a tender of the demy mark; and there the grand assize are directed to inquire whether the demandant were *seised* of the tenement *in dominico suo ut de feodo* (not saying *et de jure*) tempore dicti domini regis Henrici octavi (*b*). He then referred to various precedents in formedon & juris utrum, the one the writ of right of tenants in tail, *H.* 18 *Ed.* 4. 23. *pl.* 6, and *Bro. Abr. Droit. de Recto, pl.* 33.: the other, the ecclesiastical writ of right, *Fitzh. Nat. Brev.* 50. G. (*p.* 116 *ed.* 1755.) where the allegation is only of the *seisin in fee*, and not of the *right*. 1. In formedon, *Rastal*, tit. *Formedon in Remainder, pl.* 3. *Co. Entr. Formedon in Descender, pl.* 5. The donees in tail are only said to have been seised in dominico suo, &c. without the words *de jure;* though their heir is stated to be seised *de jure*. There are separate counts also against four vouchees in the same form. In *ibid. pl.* 10. the feoffees to uses are not said to be seised *de jure;* but the heir in tail who entered is said to be so seised. In *Co. Entr. Formedon in Remainder, pl.* 14. neither the donor nor the feoffees to uses before the statute, nor the cestuy que use after the statute, are said to be seised *de jure*. Former proceedings are there set out, which have not those words; and the tenant pleads without them as to some persons, though as to others, the words *de jure* are introduced. There is a like precedent, *ib. pl.* 15. and *ib. pl.* 16. in *Reverter*. In *pl.* 18. in *Reverter*, the donor is not stated to be seised *de jure*, though the seisin of the donee is so alleged. In *Rastal's Entr. Formedon, pl.* 5. the donee is first said to have been seised *in dominico suo ut de feodo* only, and then to have died

(*a*) P. 102., and vide p. 98., and 1 *Reeves' Hist. of Law*, 429.

(*b*) See also another similar precedent in *Lit. s.* 514.

seised,

seised, &c. feodo *et jure.* In *pl.* 6. the seisin of the donor is alleged without the words *de jure*; that of the donee with them. In ib. *Formedon in descender*, *pl.* 8. the donee is seised *in dominico suo ut de feodo talliato*: but the heir is seised, &c. de feodo *et jure.* In *pl.* 9. both the donee and heir are said to be seised only *in dominico suo ut de feodo talliato.* In *Resceit. in Formedon*, *pl.* 5. the donor is seised in dom. suo ut de feodo, the donee in dom. suo ut de feodo talliato. 2d, In *Juris utrum* the issue is, Whether the demandant have more right to hold in frankalmoigne, or the tenant as his lay fee; and the demandant always counts on some seisin of his predecessors or of his own. In *Co. Entr. Juris utrum*, *pl.* 1. the count is of a *seisin in fee in right of the chantry*: the tenant pleads a gift in tail, and several descents; but neither the seisin of the donor or donee or heir in tail is said to be *de jure.* In *pl.* 2. the demandant alleges seisin in dom. suo ut de feodo *et de jure hospitalis.* In *pl.* 3. it is in dom. suo ut de feodo *et jure ecclesiæ.* In *pl.* 4. it is in dom. suo ut de feodo *et jure, in jure ecclesiæ*: but the verdict only finds the seisin in dom. suo *ut de feodo, in jure ecclesiæ.* In *pl.* 5. the count is the same as in *pl.* 4. In *Rastal's Entr. Juris utrum*, *pl.* 2. it is in dom. suo ut de feodo *et jure in jure ecclesiæ. Pl.* 3. states the seisin *ut de jure in jure, ecclesiæ. Pl.* 4. in dom. suo ut de feodo *et jure ecclesiæ.* But the tenant pleads a seisin in fee, without saying *de jure. Pl.* 5. states the seisin ut de feodo *et jure hospitalis*; *pl.* 6, 7, and 8, ut de feodo *in jure Cantariæ.* The entries, therefore, in *Juris utrum* are in both ways, which shews that the variation is not material. As to the second ground of error, on the repugnance of calling *Hannah Ball* the *heir* of her brother *Thomas Gamlyn* the elder, when it appears that he had a son, *William Gamlyn*, who survived him; if the word

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2d *Objection*:

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heir be rejected the descent will be well pleaded. But it will be urged that all allegations of title in a writ of right are material and must be proved, and that as both the allegation that the right descended from *Wm. Gamlyn* to *Hannah Dowland*, and the allegation that *Hannah Ball*, as heir to whom *Hannah Dowland* claims, was the *heir* of her brother *Thomas Gamlyn* the father of the said *Wm. Gamlyn*, cannot by possibility be proved, the count is bad for the repugnancy in stating the title. The objection, however, supposes the word *heir* to denote necessarily a person in whom an estate actually vested by descent; but it does not; and if it did, it not being necessary to state in terms who was the *heir* of *Thomas Gamlyn* the elder, that word may be rejected as surplusage. It is a general rule in pleading so to construe words as to make all the parts consistent if possible. The word *heir* is often used in pleading to denote the person through whom a succession or descent is derived, and in whom, if living at a certain period, the estate would have vested, but did not vest. *Co. Entr. Quare Impedit, pl.* 1. *Winch's Entr.* 510. *Formedon in Remainder, ibid. Quare Impedit.* 865. 911. *Co. Entr.* 181. *Droit, pl.* 1. tit. *Formedon, pl.* 18. *Hearne's Pleader, Formedon in Reverter,* 501. *b.*, and *Winch's Entr.* 506. In the two last precedents if the count could have been avoided by shewing that the brother of the donor was not his *heir* as alleged in the count, it would have been sufficient to have pleaded that the donees were the daughters of the donor; but in both cases the plea goes on to shew a recovery suffered; and in the latter it even appears that one of the daughters died without issue before the recovery, by which her moiety vested in her sister in fee. In the present case, however, it was sufficient to have shewn that *Hannah Ball* was the

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fifter of *Thomas Gamlyn* the elder, without faying that fhe was his *heir:* for it could not have been prefumed that he had any other fons than thofe mentioned in the pleadings, or that he had any brother. The general current of authorities omits the word *heir* in fuch cafes. *Co. Entr. Ejectment, pl.* 6. *fo.* 196. *Quare Impedit, pl.* 12. *fo.* 494. The word *heir* is a term of law; and the repugnance arifes from attributing to *Hannah Ball* a character *in law* which did not belong to her, not from attributing to her any relationfhip or degree of kindred inconfiftent with what was before attributed to her, nor in introducing any *fact* to fhew that a good title could not have been derived through the relationfhip attributed before. Whether from the feveral relationfhips ftated fhe were *heir* or not to her brother was a mere legal confequence, upon which no iffue could have been taken; and it may therefore be rejected as a nugatory allegation of a matter of law, contrary to the facts ftated, which are fufficient to entitle the demandant to recover. *French* v. *Wiltfhire, Andr.* 67. *Com. Dig. Pleader,* C. 28, 29. 1 *Ventr.* 119. 1 *Lutw.* 25.

Dampier for the defendants in error, the tenants: 1ft, The feifin fhould have been ftated as de feodo *et jure.* In a proceeding not much in ufe the form of the precedents without one exception (for the precedent in *Raftal,* tit. *Falfe Judgment, pl.* 9. is found to be defectively ftated in the book, upon reference to the roll itfelf) is entitled to great weight. Of thefe there are eleven precedents in *Liber Intrationum* (*a*); one in the notes to *Fitz. Nat. Brev.* (*b*), which are by Lord *Hale;* one in *Cro. Car.*

(*a*) 1. *b.*, 2. *a.* & *b.*, 22. 1. *b.*, 107. 130. *b.*, 150. *b.*, 151. *b.*, 95. *b.*
(*b*) P. 1. n. *a.* 1.

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310., five in *Coke's Entr.* (*a*), and seventeen in *Rastal's Entries* (*b*), in all of which the seisin is stated to be de feodo *et de jure*. The precedents in *Formedon* and *Juris utrum* do not apply: neither the tenant in tail in the one, nor the parson in the other, have the *whole* estate in the land in them, which is derived from the donor in tail in the one and the gift in frankalmoigne in the other. The donation or gift, the root and origin of the claim, must be shewn, and it is not sufficient merely to shew a seisin of the estate displaced and turned to a right. The issue is not on the right. In *Formedon* the issue is non dedit. A formedon may be founded on a devise. In most of the precedents in formedon the seisin of the donor is not stated, but merely the gift; except where, as in one precedent in *Coke's Entries*, the *whole* estate is claimed in formedon in reverter. But the great majority of the precedents in formedon state the seisin of the estate tail to be de feodo *et de jure*. Of seventeen precedents in *Coke's Entries*, fourteen are *de jure*; of seven in *Winch*, all are *de jure*; of nineteen in *Liber Intrat.* eighteen are *de jure*; and of thirty-two in *Rastal*, thirty are *de jure*; and in one of the remaining two the person last seised in remainder, whose estate is displaced, is stated to be seised *de jure*: and frequently the first taker has only an estate for life when the seisin de feodo et de jure cannot be stated. The three instances in *Coke's Entries* where *de jure* is omitted are of estates given to uses before the statute; when the estate-tail being given to the feoffees to uses, and they not having the usufruct but only the legal estate, might be the reason why the seisin was not stated *de jure*. As to the two pas-

(*a*) 181. *a*.

(*b*) 241. *b*. *pl.* 1, 2, 3 5., 244. *b*. *pl.* 2, 3, 4, 5., 246. *a*. *pl.* 2, &c. 3, 4, 5, 224. *a*. *pl.* 1, 2., 130. *b*. *pl.* 1., 343. *b*. *pl.* 8, 9, &c., 273. *a*. *pl.* 8.

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ſages cited from *Littleton*, it may be true that one who has no right may be eſtopped from ſetting up the wrongful ſeiſin of the other, who has a better right againſt him; but it does not ſollow that the count is not to be in the general form. It may be conſidered in law as a rightful ſeiſin as againſt a wrong-doer who has no right. This objection, however, does not reſt merely on the precedents, but is founded in ſubſtance, on conſidering the nature and object of a writ of right, the iſſue joined in it, and the effects of it. A writ of right is to recover the *whole* eſtate in the land, and to put the demandant in poſſeſſion in full ſeiſin, notwithſtanding any inferior intervening rights, which the tenant or thoſe under whom he claims may have acquired by length of poſſeſſion. It is not therefore unreaſonable that the forms of ſuch a proceeding ſhould be ſtrictly obſerved. The right to lands is divided into the jus poſſeſſionis and the jus proprietatis. The former of which is ſometimes uſed to denote ſuch a right as may be enforced by a poſſeſſory real action; but as applied to a writ of right, the jus poſſeſſionis is immediately conſequent upon the recovery of the jus proprietatis, and the Court enforces it by the writ of ſeiſin upon its being found by the grand aſſize which of the parties has the majus jus. The object therefore is to acquire both; but the point of inquiry is as to the *right*. It is what the demandant in all the precedents aſſerts and claims, and what the tenant denies in terms; it is what the miſe is joined upon, what the grand aſſize is charged with, and what the judgment decides. It would be ſtrange then if the demandant need not claim the land as his *right* and inheritance in the writ, or that the ſeiſin by virtue of which he claims to recover *the right* need not be alleged to be a ſeiſin *of right*, or that he ſhould recover a ſeiſin

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of right which is not alleged to be ſuch; or that that which, for aught appears on the record, was not a ſeiſin *of right* in the anceſtor ſhould become a *right* in the heir, and by this recovery be converted into a ſeiſin of right. The form of the writ of right is given in 1 *Reeves' Hiſt. of Law*, 399. of the count in p. 427, 8., as it is in *Bracton*, and of the plea in p. 475, 6, &c. From thence it appears that the demandant could not have the jus proprietatis unleſs his anceſtor were ſeiſed of the *right* as well as had the poſſeſſion: the ſeiſin of the *right* is therefore a ſubſtantial allegation. If the words *de jure* could ever have been omitted with propriety, it might be expected to be in the caſe of copyholds, where the nature of the tenure veſts the eſtate in the lord, though the tenants by cuſtom have acquired a permanent intereſt and ſeiſin. Yet where a petition in the nature of a writ of right for a copyhold is ſued, the nature of the remedy, which requires the ſeiſin to be ſtated as *of right*, overcomes the difficulty; and the ſeiſin is ſtated to be "in dominico ſuo ut de feodo et de jure *ad voluntatem domini*, ſecundum conſuetudinem manerii," &c. (*a*).

On the ſecond objection, (after premiſing that the court of ancient demeſne where the demurrer was filed was not a court of record, which appeared by the writ of falſe judgment in *C. B.*, and by 4 *Inſt.* 269.; and therefore neither the ſtats. 27 *Eliz. c.* 5. nor the 4 *Ann. c.* 16. extend to it; ſo that it was competent to take any objection to the count which might in a court of record be made on ſpecial demurrer:) he contended, that in all actions by an heir, he muſt ſhew *how* he is *heir* (*b*), and à fortiori in a writ of right (*c*): and if ſo, he muſt ſet out

(*a*) *Co. Entr.* 206. *b. pl.* 10. *Raſtal's Entr.* 130. *b.*
(*b*) 1 *Salk.* 355. and *Hob.* 333.
(*c*) 1 *Reeves' Hiſt. of Law*, 431, 2., and *Bract.* 374., there cited.

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his defcent formally, and in fuch a way as to be capable of proof; or it may be fpecially demurred to. And Mr. *Reeves* (*a*) in his hiftory, &c. cites *Bracton*, 375. to fhew that if any one were omitted in the defcent, or if there were any error in the perfon or the name of any one mentioned in the defcent, the action abates. Now here it is not difputed that *Hannah Ball*, through whom the demandant makes title, is improperly ftated to be the *heir* of *Thomas Gamlyn* the elder, which could not be, as he was her brother, and he had a fon who, it appears from another part of the count, furvived him. If this be ftated as matter of fact, it is incapable of proof; if as matter of law, it is erroneoufly ftated. In *Polyblank* v. *Hawkins* (*b*), where the hufband of tenant in fee declared in covenant on a feifin of himfelf *in his demefne as of freehold in right of his wife*, it was holden bad on fpecial demurrer; for that he ought to have ftated that *he and his wife in right of his wife were feifed in their demefne as of fee*; though the objection there was more critical than in the prefent cafe. None of the precedents referred to e contrà were tried upon fpecial demurrer. He concluded with referring on this point to the authority of the Court of *C. B.*, who had decided upon the validity of this objection.

Abbott in reply, on the latter point, obferved as to the cafe of *Polyblank* v. *Hawkins*, that the error there was in ftating the *feifin*, which was the root of the title. On the firft point he faid, that the mife was not joined on the pofitive right, but whether the demandant or the tenant had *the better right*, and the verdict and judgment follows the mife. That the judgment only concludes the two parties on the record, for it is either that the demandant

(*a*) *Reeves' Hift. of Law*, p. 432. (*b*) *Dougl.* 328.

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ſhall *hold the land againſt the tenant*, or that the tenant ſhall hold it *quit of the claim of the demandant*. [Upon a queſtion put, whether the tenant might not take the miſe on the *ſeiſin* only,] he anſwered, that that was only done, as he could find, upon tender of the demy mark, to inquire of the ſeiſin of the demandant's anceſtor in the time of the king alleged. But that there was one precedent in *Coke's Entries* (*a*) which runs thus: " Et præd. *J. C.*, &c. per *A. B.* att. ſuum veniunt et defend. pro præd. *R. K.* et *etiam* (which by reference to the roll appears to be a miſprint for *ſeiſinam*) præd. *W. R.* de quo," &c. and prays in aid, &c.

Lord ELLENBOROUGH C. J. in this term delivered judgment.

This was a writ of error brought upon a judgment in the Court of *C. P.* on a writ of falſe judgment returnable in that court, complaining that falſe judgment had been given in the court of the manor and foreſt of *Gillingham*, in a plea of land between theſe parties. The ſheriff in his return to the writ of falſe judgment ſtates, that he had recorded the plaint, and ſets out the proceedings in a writ of right cloſe, and the count founded thereon; and by which *Thomas Dowland* by his attorney demanded againſt *William Slade and Elizabeth his wife*, the defendants in error, certain lands ſituate in the manor of *Gillingham*, in the county of *Dorſet*, and within the juriſdiction of that court, and whereof he ſaid, that *Thomas Gamlyn was ſeiſed in his demeſne as of fee*, according to the cuſtom of the manor aforeſaid: and then derives title by deſcent from *T. Gamlyn* as follows, viz. that from the ſaid *Thomas Gamlyn* the right to theſe tenements deſcended and came

(*a*) 181, *a. pl.* 4.

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to one *William Gamlyn*, as brother and heir of the said *Thomas*, (subject to the estate of freebench therein according to the custom of the manor of *Elizabeth the wife of the said Thomas*); and that from the said *Wm. Gamlyn* the right to those tenements descended and came to one *Hannah Dowland, as eldest cousin and heir of the said William Gamlyn*, that is to say, as *eldest daughter and heir* of *Hannah Ball, who was the only sister and heir of one other Thomas Gamlyn*, who was the father as well of the first-mentioned *T. Gamlyn* as of the said *W. Gamlyn*; (which said *Eliz. Gamlyn* died in the lifetime of the said *Hannah Dowland*); and from the said *H. Dowland* the right to the said tenements with the appurtenances descended and came to one *Thomas Dowland*, and from him to the now demandant.

Upon this record two objections have been made to the judgment which has been given in the court baron of the forest manor of *Gillingham* for the demandant. The first is, that it is not alleged that *T. Gamlyn*, from whom the demandant deduces his title, was seised "in his demesne as of fee AND RIGHT;" but only "in his demesne as of fee," of the lands in question. The second objection is, that in deducing the title from *T. Gamlyn*, the demandant claims through *Hannah Dowland*, who is stated to be the heir of *W. Gamlyn*, and that the right descended to her, as heir of *Hannah Ball*, who is stated to have been the heir of one *Thomas Gamlyn*, the father of *W. Gamlyn*; which could not be; for if *Hannah Dowland* was the heir of *W. Gamlyn*, *Hannah Ball*, (through whom she claims, and *who* is stated to be the *heir* of *Thomas Gamlyn* the father) must have died before *W. Gamlyn*, in which case *he*, and not *Hannah Ball*, must have been *the heir* of *Thomas Gamlyn* his father. On this writ of false judgment

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ment the Court of Common Pleas reverfed the judgment of the court of the foreft manor, being clearly of opinion that this *laft objection* was fatal: and though they did not decide on the firft objection, they inclined to think that fatal alfo; as all the precedents with the exception of one only contained the above allegation. On this judgment a writ of error having been brought, it has here been argued that the judgment of the Court of Common Pleas is erroneous, for that the allegation, that the anceftor from whom the demandant claims was feifed AS OF RIGHT, is but matter of form, which may be inferted in the count or not; for that a writ of right may be maintained on a wrongful feifin, as by an *infant diffeifor* againft his own alienee; that the feifin cannot be admitted and the right denied. And though the iffue be in this proceeding *formally* on the *right*, yet the tenant, generally fpeaking, is to begin, and fhew that he has *more mere* right than the demandant: and though it was admitted that all the precedents of counts in writs of right allege the feifin *de jure*, and that upon further inveftigation there is not even that fingie exception, which, when the cafe was argued in the Common Pleas, was fuppofed to exift; the entry in *Raftal* by an examination of the roll having been fince found incorrect; yet, from analogy to counts in *formedon*, and *juris utrum* which are proceedings in the nature of writs of right, where the allegation *de jure* is frequently omitted; it was infifted, that the averment that the feifin was *de jure* is but *a form*, not neceffary to be obferved. And as to the laft objection, it has been faid, that the count need not have alleged that *Hannah Ball* was *the heir* of *Thomas Gamlyn*, and that word may therefore be rejected, or underftood only, as a word of pedigree, and as denoting a defcent mediately through, and not directly and imme-

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diately from, that particular anceſtor: or if not, that as a good title is ſtated in fact, the party ſhall not be prejudiced from a miſtake in a legal concluſion from ſuch fact. But notwithſtanding the ingenuity and learning with which this caſe has been argued, we are of opinion that the judgment of the Court of Common Pleas muſt be affirmed; which Court, it may be reaſonably concluded, from what was ſaid by the Chief Juſtice in delivering his opinion, would have decided againſt the plaintiff in error on both points, had it not been ſuppoſed that there exiſted one exception to the univerſality of alleging the ſeiſin of the anceſtor of the demandant to be *of right*: and as it is now found that there is no ſuch exception, it would be too much to conclude that an allegation, which has not been found in any caſe to have been omitted, may or may not be uſed *ad libitum* in a proceeding, the object of which is to decide in favour of that party, *whoſe right* to the lands in diſpute is greateſt. The reference to the 478th ſect. of *Littleton*, from whence it appears, that *an infant diſſeiſor may recover in a writ of right againſt his alienee*, does not ſhew that the form of the count muſt not be as the defendant inſiſts; for as between ſuch parties, the diſſeiſor has *the greater right*; and his ſeiſin, though acquired by wrong, will eſtabliſh a right againſt one who can only claim under the demandant, whoſe alienation on account of his non-age will not be binding. And the analogy from counts on writs of *formedon* and *juris utrum* does not hold; for in them the *mere right* to the lands is not put in iſſue, as in writs of right properly ſo called; for in *formedon* the general iſſue is *non dedit*, that is, the *entail*, not the *mere right* is traverſed: and in *juris utrum* the general iſſue for the tenant is, that *it is his lay fee, and* not *the alms of the church*: (vid. *Booth's Real Actions*, p. 222.

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p. 222. and *Co. Ent.* 400.) But this matter does not rest merely upon reasoning; for *Bracton*, in the chapter referred to by Mr. *Reeves* in the passage cited at the bar, and in whose time actions of this sort were common, and who must have been well acquainted with what was necessary to be alleged in counts on writs of right, lays it down expressly, that the count must allege that the seisin was *de jure:* the passage is to be found in *p.* 372. *b.*, where the author having stated the form of the count in a writ of right, in which the ancestor is averred to have been seised "in dominico suo ut de feodo *et jure*," proceeds thus to comment on the count: "Non enim sufficit simpliciter "proponere *intentionem* suam (by which word the count is "meant), sic dicendo, peto tantam terram ut "*jus meum*," "nisi sic illam fundaverit, quod doceat ad ipsum *jus* per-"tinere, et *per quam viam*, et per *quos gradus jus* ad *ipsum* "*debeat descendere*. Item cum agat per breve de recto ad "utrumque jus consequendum (s) tam jus possessionis "quam proprietatis de seisinâ talis antecessoris, non suffi-"cit si dicat, quòd talis antecessor suus fuit seisitus in "dominico suo ut de libero tenemento tantum, "*vel in* "*dominico suo ut de feodo tantum*," nisi doceat quod in do-"minico suo ut de feodo, quod sub se continet liberum "tenementum, et totum jus possessorium, nisi dicat et ad-"jiciat *et jure*, quod sub se continet *jus proprietatis*." And afterwards in page 273. *b.* he adds, "Si autem in "narratione faciendâ *aliquis* articulorum prædictorum "*omittatur*, et narratio a petente advocetur, ita quod error "revocari non possit; et petens clameum suum pro se, et "hæredibus suis amittet in perpetuum." The same doctrine may be found adopted in *Fleta*, book the 6th, *c.* 16. de Narrationibus, transcribed apparently from *Bracton*. Upon these authorities we are of opinion, that for the

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first objection the count in this case is bad; that the judgment of the court baron was false; and that the judgment of the Court of Common Pleas must be affirmed. And this makes it unnecessary to say any thing as to the second objection, or to examine the many authorities from the entries, which the industry and ingenuity of the counsel have brought together on that point.

Judgment affirmed.

Thursday, June 7th.

REUBEL *against* PRESTON.

The Court will quash a writ for irregularity if it have an informal return, although the day of the return be equally certain as in the common form.

THE defendant was arrested upon a bill of *Middlesex* issued the 28th of *May, returnable* "*on* Monday *next after the morrow of the* Holy Trinity," instead of the usual return *on* Monday *next after* 8 *days of the* Holy Trinity (*a*).

Nolan obtained a rule for setting aside the proceedings for irregularity, on account of this departure from the settled form of returns; against which

Marryat shewed cause, contending that the writ was equally obligatory on the sheriff where there was a day certain named in the writ for his making his return in term time, in whatever manner it was computed. But

Lord ELLENBOROUGH C. J. said, there was no reason for departing from the settled form which had been always adopted in describing the return days of the term in writs, though by computation the sheriff might know as well on what day to make his return. If the regular

(*a*) *Vide* the Table of Terms and Returns, *Tidd*'s Appendix, ch. 2. N.

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known forms were departed from in one inſtance, a thouſand whimſical returns might be framed, and great confuſion introduced.

Per Curiam, Rule abſolute.

Marryat then prayed leave to amend, which was granted.

Friday, June [illegible]*th.*

WHITE *againſt* JONES, Marſhal of *K. B.* &c.

B. being in cuſtody at the ſuit of *A.*, in a joint action againſt *B.* and *C.*, *B.* juſtifies bail in an action intitled by miſtake *A.* againſt *B.* only, and a rule ſo intitled is ſerved on the marſhal of *B. R.*, who thereupon diſcharges *B.* out of cuſtody, he not being charged in cuſtody in any more than one action at the ſuit of *A.*: held that the marſhal was liable in an action for an eſcape.

THE plaintiff declared in caſe againſt the defendant for an eſcape, and ſtated that whereas one *S. Mendel* and *J. O.* were indebted to the plaintiff in 400*l.*, the plaintiff for recovery thereof proſecuted out of *B. R.* a ſpecial capias ad reſpondendum againſt them, marked for bail, &c. under which *S. M.* was arreſted, and for want of bail was afterwards committed to the cuſtody of the Marſhal, charged with the ſaid action: and then proceeded to charge the Marſhal for voluntarily permitting the ſaid *S. M.* to go at large without the licence of the plaintiff, to his damage, &c. Pleas, 1ſt, Not guilty. 2dly, Actio non, &c. becauſe after the commitment of the ſaid *S. M.* to the defendant's cuſtody a rule of court was made, ordering the ſaid *S. M.* to be *diſcharged* out of the cuſtody of the Marſhal *as to the ſaid action*, by virtue of which rule the defendant diſcharged the ſaid *S. M.*, &c. and upon which iſſue was taken. 3dly, Actio non, &c. becauſe after the commitment of the ſaid *S. M.* to the cuſtody of the defendant a certain rule of court was made, &c. (and then the plea ſet out the tenor of the rule, which was intitled "*White* v. *Mendel,*" (omitting the other defendant's name), and ſtated that bail having been

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been put in and justified for the defendant, and allowed, the defendant should be discharged *as to this action*). By virtue of which rule the defendant as Marshal afterwards discharged the said *S. M.* And then the defendant averred *that the said* S. M. *was not at the making of the said rule, or at any other time in his custody in any action whatsoever, except the said action in the declaration mentioned*, and that *the person mentioned in the said rule by the name of* Mendel *is the same person*, &c.; which discharge of the said *S. M.* is the same escape as that now complained of, &c. Replication, that the bail mentioned in the rule in the last plea set forth to have been put in and justified, were put in for the said *S. M.*, and justified *as in an action brought by the plaintiff against the said* S. M. *only, and not in the said action so brought against the said* S. M. *and the said* J. O., as by the record of the recognizance of such bail, &c. appears. And further, that after the making of such rule, and *before* the defendant *discharged* the said *S. M.* out of his custody, *the defendant had notice of the said premises*. To this there was a general demurrer and joinder.

Wood in support of the demurrer. This was a mere irregularity in the justification of bail, which was intitled "*White* against *Mendel and another*," instead of mentioning the other defendant's name. But whether bail were put in or not, or irregularly put in, it will make no difference as to the Marshal, who is at any rate bound to obey the rule of the court, and cannot be liable as for an escape in so doing.

Lord ELLENBOROUGH C. J. It is an unfortunate mistake, but we cannot help the Marshal. The rule was to discharge the defendant out of custody in one cause,

 intitled

White *against* Jones.

intitled "*White* against *Mendel*," and the Marshal has discharged him in another cause, a joint action of *White* against *Mendel* and *J. O.*, for which he had no authority. I will assume that *Mendel* was only charged in the Marshal's custody in one cause at the suit of *White*; but then the rule was nugatory, being intitled in a cause of "*White* against *Mendel*," and the defendant not being charged in his custody in any such cause. The rule therefore did not justify him in discharging his prisoner in an action to which it did not apply.

The other Judges concurring,

Judgment for the Plaintiff.

Marryat was to have argued for the plaintiff.

Friday, *June* 8th.

Edgcombe *against* Rodd and Others.

The toleration act, 1 *W. & M.* c. 18 provides (*s.* 18.) that any person maliciously disturbing any dissenting congregation under that act, on proof before a justice of peace, shall find sureties in 50*l.*, or in default be committed to prison till the next sessions, and on conviction forfeit 20*l.* to the Crown. To an action against magistrates for trespass and false imprisonment they pleaded a charge preferred before them for an offence against that clause, and a commitment for want of sureties under it, to the next sessions; and that before the next sessions it was agreed between the prosecutor and the now plaintiff, *with the consent* of the committing magistrates (the now defendants) that the prosecution should be dropped, and the plaintiff be discharged at the sessions for want of prosecution; that the plaintiff was accordingly then and there so discharged *in full satisfaction and discharge of the assault and imprisonment*: held this was no legal satisfaction; for either the agreement was illegal, as stifling a prosecution for *a public misdemeanor*, and thereby impeding the course of justice; or the satisfaction, if any, was moving from the prosecutor only, and not from the justices; their authority over the prosecution being at an end after the commitment of the plaintiff, and *their consent* afterwards to the prosecutor dropping the prosecution being a mere nullity, and no satisfaction for a prior injury, if any, received by the plaintiff from their act.

To trespass for an assault and false imprisonment, the defendants pleaded, 1st, not guilty; 2dly, that the assault and imprisonment were by virtue of a warrant under the hands and seals of the defendants, three justices of the peace for the county of *Cornwall*, granted by them against the plaintiff upon a complaint made to them as such justices by *C. M.* of a certain misdemeanor by the said *C. M.* alleged to have been theretofore committed by

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the plaintiff againſt the ſtat. 1 *W.* & *M.* (*c.* 18. *ſ.* 18. the toleration act): whereupon the plaintiff for default of ſuch ſureties as are in that ſtatute expreſſed was committed to the priſon of *Bodmin* in the ſaid county till the next quarter ſeſſions, &c. And afterwards and *before* the ſaid quarter ſeſſions, &c. it was agreed between the plaintiff and *C. M.* *with the conſent of the defendants*, that *C. M.* ſhould not further proſecute the plaintiff for the ſaid alleged offence, and ſhould conſent to his diſcharge at the then next enſuing quarter ſeſſions, &c. *in full ſatiſfaction and diſcharge* of the ſaid aſſault and impriſonment. And then the defendants averred, that at the then next enſuing quarter ſeſſions, &c. (*a*), *C. M.* did not further proſecute the plaintiff for the alleged offence, and *then and there conſented to the plaintiff's diſcharge;* and the plaintiff was by order of the ſame court diſcharged accordingly. And the plaintiff then and there *accepted* C. M.'*s not further proſecuting him* for the ſaid alleged offence, and *his conſent to the plaintiff's diſcharge, and the plaintiff's diſcharge thereon*, in full *ſatisfaction and diſcharge* of the aſſault and impriſonment of the plaintiff. There was a third plea only differing from the laſt in omitting to ſtate the *agreement* before the next quarter ſeſſions after the commitment between the parties, *with the conſent of the juſtices* to drop the proſecution; but only ſtating that at the next quarter ſeſſions after the commitment, the ſaid *C. M.* did not further proſecute the plaintiff for the alleged offence, but conſented to his diſcharge; and that the plaintiff was then and there *diſcharged by order of the ſame Court in full ſatisfaction and diſcharge of the ſaid treſpaſſes, &c. which ſame premiſes the plaintiff then and there accepted in full ſatisfaction and diſcharge of the ſeveral treſ-*

(*a*) One of the defendants was ſtated as one of the juſtices before whom the ſeſſions was holden.

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passes, &c. To these special pleas there were demurrers, stating, with the common causes, these special causes, that they did not shew with what misdemeanor the plaintiff was charged by the said complaint, nor whether the complaint were in writing, or upon the oath of *C. M.* or any other person; nor for what misdemeanor the plaintiff was committed.

Burrough, for the plaintiff, said that, without entering into the special causes of demurrer, the pleas were avoided by the stat. 1 *W.* & *M. c.* 18. *s.* 18. whereby any person, guilty of the offence with which the plaintiff was charged before the defendants, "upon proof thereof before any "justice of peace by two witnesses shall find two sure- "ties to be bound by recognizance in 50*l.* and in default "of such sureties shall be committed to prison, there to "remain till the next quarter sessions; and upon con- "viction of the said offence at the said sessions, shall be "liable to the *penalty of* 20l. *to the use of the Crown.*" It was not therefore in the power of the prosecutor and the magistrates combined together, after the latter had committed the plaintiff to custody for trial for this offence, in default of the sureties required by the statute, to agree to his discharge, as that tended to deprive the crown of its security for the payment of the penalty, in case the plaintiff had been convicted. The first of the special pleas is founded upon an accord and satisfaction; but nothing can be pleaded as a satisfaction which is not a legal one; and this is not so for the reason mentioned. But further the consent of the magistrates to the plaintiff's discharge was of no consequence; for having once committed him, they had no longer any control over the prosecution. It was still in the power of the prosecutor to go on with the prosecution, though against the consent

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of the magiſtrates. The defence is not put upon the ground that the proſecutor and the magiſtrates had been guilty of a joint treſpaſs againſt the plaintiff, and that the latter had accepted ſatisfaction from one of them on account of ſuch treſpaſs, which might have been pleaded as accord and ſatisfaction. Neither is it to be compared to the diſcretionary power ſometimes exerciſed by this Court upon application for an information, which in the exerciſe of their lawful diſcretion to grant or refuſe it, they will ſometimes, to prevent oppreſſion, make it part of the terms of granting it, that the party applying ſhall not bring any action for the ſame injury, or ſhall diſmiſs his action, if brought. For this Court have a legal control over proceedings inſtituted by their authority, and may ſtay the further proſecution of them if they ſee juſt cauſe for it. But juſtices of peace have no ſuch diſcretionary power veſted in them by law. Then the ſecond ſpecial plea ſtands on the ſame foot; it is entire, and the *ſatisfaction* which is part of it, cannot be ſtruck out. (This was admitted è contrà). If it could, the ſpecial cauſes of demurrer would apply.

Dampier contrà. There is nothing illegal in parties compromiſing a *miſdemeanor*. In *Johnſon* v. *Ogilby* (*a*), Lord Chancellor doubted whether an agreement, the object of which was to get rid of a criminal proſecution for a fraud, could be enforced in equity: but it being anſwered at the bar that this was different from the caſe of compounding a felony; and that where the indictment was for a fraud, and the party injured agreed to accept ſatisfaction, as in conſcience he ought; this was lawful, and the fraud was cognizable and relievable as well in equity as at law. Wherefore the objection was no fur-

(*a*) 3 *P. Wms.* 279.

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ther insisted on. [Lord *Ellenborough*, C. J. Is is not illegal to compound a prosecution for perjury? The case of *Collins* v. *Blantern* (*a*) proceeded on that ground; where a bond given to secure an agreement for that purpose was holden to be void.] That was given as a *bribe* to stifle the prosecution, which admits of a different consideration. If these defendants had done any thing illegal, or had acted from corrupt motives in stopping the prosecution, they could not have set up the agreement as a defence. And as to the right of the Crown being defeated, no forfeiture could vest in the Crown before conviction, and till conviction every person is to be presumed innocent. But whatever right might have vested in the Crown, nothing which the magistrates did could defeat it; but it was still competent to the Crown to have proceeded for the penalty. [Lord *Ellenborough* C. J. Has not the law required, for the preservation of the public peace and the protection of persons conforming to the toleration act, that those who are charged before the magistrates on satisfactory evidence of a breach of that law should find sureties, or be imprisoned till the next sessions?] Here the plaintiff was imprisoned *till* the next sessions; and therefore the public had the security required. But it does not follow, though there might be just ground for the commitment, that there was sufficient to convict the accused: as two witnesses are required to justify the commitment, it seems to follow that the offence must be established at the trial by the same number, and one of the witnesses might have died in the interval. So matter of defence may be brought forward to warrant an acquittal on the merits. The agreement was that *Marshal* would not prosecute the plaintiff at the sessions; that was a benefit as far as it went to the plain-

(*a*) 2 *Wilf.* 341—9.

tiff,

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tiff, though another might profecute: and any confideration, however flight, is fufficient to uphold an agreement. *Comber* v. *Wane* (*a*), (which has been doubted (*b*), is the only cafe which fays, it muft be a *reafonable* fatisfaction: But the true rule is laid down in *Andrew* v. *Boughey* (*c*), where one declared upon an agreement for the delivery of 400 lbs. of good wax, and a breach by delivery of 373 lbs. of bad wax; to which the defendant pleaded that 20 lbs. of wax had been given and accepted in fatisfaction: and this was holden to be a good bar; for, though it were not of one hundredth part of the value of the plaintiff's lofs, yet *by his own accord and agreement*, and his *acceptance* of the wax, this injury was difpenfed with. Here *Marfhal*, having in the firft inftance fubmitted his complaint to the defendants, would not have acted properly in compromifing the profecution without their confent; fuch confent therefore was a confideration moving from them. And when the party injured and the accufed were fatisfied that the profecution fhould drop with the confent of the magiftrates, there was no more illegality in fuch a tranfaction than when the fame thing is done by the confent of this Court, which is in common experience in cafes of perfonal mifdemeanors. [*Lawrence* J. afked what *act* the *magiftrates* had done which was to be taken as a fatisfaction to the plaintiff for the injury received? For their *confent* that *Marfhal* fhould not profecute was a mere nullity.] It is not neceffary that the fatisfaction fhould move from the party whofe trefpafs is fatisfied: a man's friends may bargain for him; and if the party injured accept any thing in fatisfaction of the trefpafs from a ftranger, it is fufficient.

(*a*) 1 *Stra.* 426. (*b*) Sed vide *Fitch* v. *Sutton*, ante, 230.
(*c*) *Dy.* 75. *a.*

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cient. [*Lawrence* J. It was holden in *Grymes* v. *Blofield* (*a*), in an action of debt on an obligation for 20*l.* that a surrender of a copyhold by *J. S.* (a stranger) to the use of the plaintiff in satisfaction of the 20*l.* which the plaintiff *accepted*, was no good plea.] That case is mentioned in 1 *Com. Dig.* 107. as having been ruled by *two* justices; seemingly therefore with *doubt.* [*Lawrence* J. No doubt is suggested either in the Digest or in the Report. And the case which came on twice in court was sanctioned altogether by the opinions of *three* of the Judges, the fourth not being present on either occasion.] At any rate it is an anomalous case. And it might have been a mere *voluntary* interposition of the stranger; for it is not said that he surrendered the copyhold at the request of the obligor.

Burrough in reply. The consent of the justices to the plaintiff's discharge was a mere nullity; for after they had committed him for want of sureties for trial, they were functi officio. The statute of *William* having given the penalty to the Crown is decisive of this case: and it is not necessary to consider what difference it would have made if the whole penalty had been given to the prosecutor. If the plaintiff would have been convicted, if the prosecution had not been abandoned, then public justice

(*a*) *Cro. Eliz.* 541. This case is reported amongst the cases of *Hil.* 39 *Eliz.*, but it is noted at the beginning of the case as of *Trin.* 36 *Eliz.*, and it is said in the report to have been *afterwards* in *Easter Term* 31 *Eliz*, (which must be a mistake in the print) adjudged for the *plaintiff.* But in *Rol. Abr.* 471. this account is given of it: "If the condition of an obligation be to pay 20*l.* at a certain day, and a *stranger* surrender a copyhold to the use of the obligee in satisfaction of the 20*l.* which the obligee accepts; this is *a good satisfaction and discharge of the obligation.* *Trin.* 39 *Eliz* *B. R.* inter *Grimes* and *Blofield.*"

has

has been defeated, and the Crown deprived of the penalty in consequence of this agreement: If on the other hand, the plaintiff would have been acquitted, then there has been no consideration for his agreement to forbear his remedy. In either case the plea is bad, as founded either on an illegal agreement or on a nudum pactum. The case of *Collins* v. *Blantern* (a) went on the ground that the compromise of the prosecution was illegal. There is no ground for saying that two witnesses were required in order to convict; and if the death of witnesses was the reason for dropping the prosecution, it should have been so stated, and the plea should have taken another form.

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Lord ELLENBOROUGH C. J. The pleas are bad at any rate; whether on the ground stated in the case of *Grymes* v. *Blofield*, which has been mentioned, that the satisfaction, if any, proceeded solely from a stranger, for so *Marshal* must be taken to be as to these defendants; or upon the ground which has been principally relied on at the bar, that this was an illegal agreement, and no consideration for it could arise to the plaintiff out of the acts of the defendants. The toleration act in order to protect religious congregations in the exercise of their worship, has annexed a penalty of 20*l*. on persons guilty of disturbing them; and, in order to secure the public in the interval between the commission of the offence and the trial of the offender, it has required the magistrate before whom the complaint is lodged, to take security from the offender, or in default of giving such security, to commit him to the next sessions. Then, instead of abiding the time of his delivery, when he should be discharged in due course after trial, in case he established his innocence, he stipulates with the prosecutor and the com-

(a) 2 *Wils.* 341.

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committing magiſtrates that the proſecution ſhall be dropped, and that he ſhall be diſcharged for want of proſecution. Such an agreement has a tendency to produce impunity for the commiſſion of the offence which the Legiſlature meant to prevent; it ſtops the means of the Crown to recover the penalty of 20*l.* in caſe the plaintiff had been proſecuted and found guilty. In *Collins* v. *Blantern* an agreement to put an end to a proſecution for a miſdemeanor, was conſidered to be illegal, as impeding the courſe of public juſtice. And this produced the ſame miſchief.

GROSE, J. The facts ſtated cannot amount to a *legal* ſatisfaction of the treſpaſs in this caſe; for the agreement ſtipulating for the plaintiff's diſcharge for want of proſecution, was illegal and void. Put the caſe that the plaintiff was guilty; then public juſtice has been defeated, and the agreement was illegal. But if he were innocent; then he would have been entitled by law to his diſcharge; and the defendants having only conſented to that which by law he was entitled to have, have made him no *ſatisfaction*.

LAWRENCE J. I hold theſe pleas to be bad on the ground of there being no *ſatisfaction* ſhewn in them. If the plaintiff were guilty, the proſecution ought to have been proceeded on, and the defendants can claim no benefit from any thing they may have done to prevent it. The juſtice of the country has been defeated. But if the plaintiff were not guilty, what *benefit* can he be ſaid to have received from the defendants in ſatisfaction of the wrong he has received? The juſtices having committed him to cuſtody, as it now appears without any ground for it,

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they only agreed that they would not add injury to injury by consenting that the prosecutor should not go on with an unfounded prosecution. But what satisfaction is there in that for the injury already received? Then if the case in *Cro. Eliz.* be law, the pleas are bad on another ground, that satisfaction from a stranger is no satisfaction in law. Lord C. B. *Comyns* does not appear to doubt the case by his manner of stating it; for having first stated instances of accord and satisfaction which are good pleas, he next states those that are not good; amongst which latter the case in question is classed; and he himself expresses no dissatisfaction with it.

LE BLANC, J. The pleas cannot be supported on the grounds stated. The satisfaction, if any, moved altogether from *Marshal* the prosecutor. The justices by merely consenting to *Marshal*'s dropping the prosecution, did nothing for the benefit of the plaintiff. This it must be remembered was a prosecution for a *public misdemeanor*, and not for any private injury to the prosecutor. If then the plaintiff had been rightly committed by the magistrates, they should have taken no part in any bargaining whether the prosecution were to go on or not. If the plaintiff had acted illegally in what he had done, there could be no legal consideration for such an agreement in their consenting to stop the prosecution. And if he had not acted illegally, then their consenting to *Marshal*'s dropping an illegal prosecution, to which their consent was not necessary, would be no consideration to the plaintiff for giving up any right of action he might have against the defendants for the part they had before taken in the transaction.

Judgment for the plaintiff.

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Friday, June 8th.

The KING *against* OSMER.

An indictment for an assault, false imprisonment, and rescue, stated that the Judges of *the Court* of Record *of the town and county*, &c. of *P.* issued their writ, directed to *T. B.*, one of *the serjeants at mace of the said town and county*, to arrest *W.*, by virtue of which *T. B.* was proceeding to arrest *W. within the jurisdiction of the said court*, but that the defendant assaulted *T. B. in the due execution of his office*, and prevented the arrest: held such indictment bad; it not appearing that *T. B.* was *an officer of the court*: and that there could not be judgment after a *general* verdict on such a count as for a common assault and false imprisonment; because the jury must be taken to have found that the assault and imprisonment was for the cause therein stated, which cause appears to have been that the officer was attempting to make an illegal arrest of another, which being a breach of the peace, the defendant might, for aught appeared, have lawfully interfered to prevent it.

THE second count of the indictment stated, that the mayor and senior bailiff of the town and county of the town of *Poole*, the judges of the weekly court of record of the said town and county, by their writ issued out of the said court, dated 14th *July*, 43 *G.* 3., directed to *W. C.* and *T. Brown*, *serjeants at mace of the said town and county*, did command them to take *B. Willis*, if he should be found in their bailiwick, and keep him safely, &c. so that they might have his body before the mayor, &c. on, &c. to answer *J. S.* in a plea of trespass on the case, which same writ, on, &c. at, &c. within the jurisdiction of the said court, was delivered to the said *T. Brown*, *one of the serjeants at mace of the said town and county*, to be executed in due form of law: by virtue of which said writ the said *T. B.* afterwards, &c. on, &c. at, &c. at the town and county aforesaid, and *within the jurisdiction of the court* aforesaid, was proceeding to arrest the said *B. W.* according to the exigency of the said writ. And that the defendant, with others unknown, afterwards, &c. in the town and county aforesaid, and within the jurisdiction of the said court, in and upon the said *T. B.*, then and there being one of the serjeants at mace aforesaid, and *in the due execution of his said office*, did make an *assault*, and did also *imprison* him, &c.; and that the defendant and the said others unknown, with force and arms, &c. did violently prevent the said *T. B.* from arresting the said *B. W.*, as by the same writ he was commanded, &c. After verdict

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for the crown, it was moved to arreſt the judgment, 1ſt, becauſe it did not appear that the writ ſet forth in the indictment was one under which *Willis* could legally have been arreſted. For by the ſtat. 12 *Geo.* 1. *c.* 29. extended to inferior courts by ſtat. 19 *Geo.* 3. *c.* 70., where the cauſe of action ſhall not amount to 10 *l.* the plaintiff ſhall not arreſt the body of the defendant, but merely ſerve him perſonally within the juriſdiction with a copy of the proceſs; and where the cauſe of action ſhall amount to 10 *l.* or upwards, an affidavit of the debt ſhall be made, "and the ſum ſpecified in ſuch affidavit *ſhall be indorſed on the back of the writ*, for which ſum ſo indorſed the officer to whom the writ ſhall be directed ſhall take bail," &c. And "if no ſuch affidavit *and indorſement* ſhall be made, the plaintiff ſhall not proceed to arreſt the body of the defendant," but ſhall proceed as before directed in caſes where the cauſe of action is under 10 *l.* 2dly, It was objected, that it did not appear that *Brown* was a legal officer of the *court* out of which the writ iſſued, or that he had authority to execute it. He is only alleged to be "ſerjeant at mace *of the ſaid town and county*."

Jekyll and *A. Moore* now ſhewed cauſe, and in anſwer to the firſt objection cited *Whiſkard* v. *Wilder* (*a*), where upon demurrer to a declaration on a bail bond, becauſe it did not ſet forth that the debt was ſworn to by the plaintiff and the ſum ſworn to marked on the writ, and ſo no authority appeared to *arreſt* the defendant; it was holden not to be neceſſary; and that the ſtat. 12 *Geo.* 1. was merely directory to the ſheriff, who is anſwerable for the omiſſion if he proceed to arreſt upon ſuch a writ: but that the proceſs was not thereby avoided, and the arreſt

(*a*) 1 *Burr.* 330.

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was ſtill good. Beſides, this part of the count is merely inducement to the obſtruction, which is the giſt of the charge. As in *R.* v. *Wright* (*a*), where in an indictment for ſuffering two perſons to eſcape who were committed by juſtices of peace for a forcible entry, againſt the ſtat. 8 *H.6.* it was objected, that the indictment did not ſet forth the manner of the commitment, nor even allege generally that it was *debito aut legitimo modo*: yet it was holden well enough, being but inducement to the offence. But at any rate, it being afterwards ſtated in this indictment that *Brown* was proceeding to arreſt *Willis* "*according to the exigency of the writ,*" and that the aſſault was made upon him "*in the due execution of his ſaid office,*" it muſt be intended that he had a lawful writ to authoriſe an arreſt; according to *Hart*'s caſe (*b*), where becauſe in an indictment for a reſcue it was ſtated, that *by virtue of a plaint* before ſuch a ſheriff the party was *lawfully arreſted*, it was intended that the officer had a good warrant. As to the 2d objection, that the officer is not ſufficiently deſcribed to be an officer *of the court*; he is ſtated to be the ſerjeant at mace of the *town and county*, which muſt be co-extenſive with the juriſdiction of the court, deſcribed to be "the weekly court of record *of the ſaid town and county,*" as in *Long*'s caſe (*c*). And it is afterwards ſtated that *Brown* was proceeding to arreſt *Willis within the juriſdiction of the court*, and that he was aſſaulted *in the due execution of his office*. The *ſerjeant at mace* of the *town and county* muſt ex vi termini be taken to be the proper officer to execute the proceſs of the court of record *of the ſaid town and county*: admitting that according to *Grant* v. *Bogge* (*d*), one who is not the proper officer of a court

(*a*) 1 *Ventr.* 169.
(*b*) *Cro. Jac.* 473.
(*c*) 5 *Rep.* 121.
(*d*) 3 *Eaſt*, 128.

cannot

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cannot juſtify an arreſt under a writ directed to him for that purpoſe. [Lord *Ellenborough* C. J. If *Brown* had been ſtated to be the ſerjeant at mace *of the court*, there might have been more ground for intending that he was the proper officer of the court to execute its proceſs; but we can intend nothing to this purpoſe from the allegation that he was the "ſerjeant at mace *of the town and county*." I do not ſee how this objection can be anſwered. *Lawrence* J. A ſerjeant at mace ex vi termini means no more than one who carries a mace for ſomebody; but for whom does not appear in this caſe.] It is incident to every court to appoint its own officer to execute its proceſs, unleſs ſome ſpecial officer be appointed by the common law, or the peculiar conſtitution of the particular court. 1 *Rol. Abr.* 526. F. *pl.* 1. And any act deſignating an individual to execute its proceſs is an appointment. And it will not be intended that the court at *Pool* did not know their proper officer. In *Raſtal's Entr.* 167. there is a precedent of a writ iſſued miniſtro curiæ, but not ſtated *ibidem*, nor that he had the execution of proceſs. [Lord *Ellenborough*. *Miniſtro curiæ* implies that he was the officer of the court at the time.] At all events ſufficient appears on the face of the count to ſuſtain the judgment as for a common *aſſault*, or at leaſt for an impriſonment, which latter is not juſtified, however illegal the arreſt may appear to be. As in *Pallant* v. *Roll* (*a*), where in treſpaſs for hunting, laid upon the ſtat. 4 & 5 *W.* & *M.* againſt the defendant as a *diſſolute* perſon, &c.; though the plaintiff failed in proving the ſpecial circumſtances under the ſtatute, yet held he might recover as for a common treſpaſs.

(*a*) 2 *Blac. Rep.* 900.

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Lord Ellenborough C. J. Though the jury in finding the defendant guilty generally upon the second count must necessarily have included the assault; yet finding as they do the whole count, we must take it that they found the assault committed under the circumstances charged in that count. Which brings the case back to the objection which I before stated to be decisive, that *Brown* is not stated to be an officer *of the court*, and consequently no authority is shewn for his making the arrest. Process ought always to be directed to a proper known officer; otherwise, if it may be directed to any stranger, it might be resisted for want of knowledge that the party is an officer of the court. Then taking the whole count together, the jury in effect find that there was an assault and imprisonment, but committed under circumstances which justified the defendant. For if a man without authority attempt to arrest another illegally, it is a breach of the peace, and any other person may lawfully interfere to prevent it, doing no more than is necessary for that purpose; and nothing further appears in this case to have been done.

The other Judges agreed.

Judgment arrested.

Gibbs, *Lens* Serjt., *Dampier*, and *Jervis* were to have supported the rule.

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The KING *against* The Inhabitants of KEYNSHAM. *Saturday, June 9th.*

Where a sum agreed to be given with an apprentice was 5 guineas, which was inserted in the indenture, and the duty paid accordingly, by stat. 8 *Ann. c.* 9. held well, tho' in fact only 4 guineas were paid; for the *full sum received, given, paid, agreed or contracted for*, as required by the act, was inserted, and the duty paid for it, and the stamp used was of the same description and the duty appropriated to the same fund as if 4 guineas only had been inserted and paid for, supposing that would have sufficed.

THE pauper *Thomas Moss*, being legally settled by birth at *Keynsham*, in the month of *October* 1791, was bound apprentice for 7 years to *Joseph Cromwell*, who resided at *Bath*. The sum of five guineas was agreed to be paid by the father to the master as a premium, and was the sum inserted in the indenture. But the only sum which appeared to have been paid was the sum of four guineas, which was paid at the time of dating and executing the indenture. The Sessions, on appeal, considering the indenture as void under the stat. 8 *Ann. c.* 9. confirmed the original order of justices, by which the pauper, his wife and child, had been removed from the parish of *Westwood* in the county of *Wilts* to the parish of *Keynsham* in the county of *Somerset*. It was admitted on the argument of the case, that the duty had been paid on the sum *contracted for*.

Casberd, in support of the orders, insisted that the indenture was void under the 35th and 39th sections of the stat. 8 *Ann. c.* 9.; for the provisions of the statute were not satisfied merely by inserting in the indenture the sum *contracted* for; but the sum *actually paid* should have been stated, and the stamp proportioned accordingly. The several words used in the act, namely, "sum or sums *received*, or in any wise directly or indirectly *given, paid, agreed*, or *contracted for* with any apprentice," were inserted for the purpose of embracing every possible case, and were to be considered distributively, with reference to the particular nature of the transaction at the time of executing the indenture. Thus if the contract at that time

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were as far as regarded the premium *executory*, it was necessary to insert in the indenture the sum which was *agreed* or *contracted for*: and to that contingency those words in the act were meant to apply: but if the premium were actually *paid* at the time of executing the indenture, then *the sum paid* should be the sum stated; to meet which latter event the words *received*, *given*, and *paid* were included in the statute. To put a different construction on the act would be to give an option to the master to insert either the sum agreed for or the sum paid; and in cases, the reverse of the present, where the sum contracted for might be less than the sum actually paid, an evasion of the duty imposed by that act, in consequence of such a supposed direction, might be practised. If this construction were just, it was no answer to the objection that a larger sum than that paid was in this case inserted in the indenture. Both the 35th and 39th sections require that the sum should be *truly* inserted: and if a different, though a larger, sum were mentioned, it could not be contended that the words of the statute were complied with. In *Farr* v. *Price* (a) the Court held that a stamp of greater value than that required invalidated a promissory note, though it were applicable to the same kind of instrument; and the same reasoning applies to this case, in which it may as well be urged that the letter of the statute of *Anne* should be strictly observed, and that no other than the precise sum paid should be stated in the indenture.

Jekyll, contrà, was stopped by the Court.

Grose J. (b) In construing the act of parliament, we must attend to the intention of the Legislature, which

(a) 1 *East*, 55. (b) Lord *Ellenborough* C. J. was absent at *Guildhall*.

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was to raife a revenue by the payment of certain duties upon indentures of apprenticefhip, &c. and to take care that the public were not defrauded of the fair duty. For this purpofe the act requires (f. 35.) "that the *full fum* "of money *Received*, or in anywife directly or indirectly "given, paid, agreed, or contracted for," with the apprentice, "fhall be *truly inferted* in words at length" in the indenture, &c. under a certain penalty; and then the fubfequent claufe (f. 39.) avoids the indenture "if the "fum received, given, paid, fecured, or contracted for" be not fo truly inferted. Now by requiring the *full fum* to be inferted, it meant that *not lefs* than the fum upon which the duty was really payable fhould be inferted: and here not only the *full fum*, but in truth *more* than the fum for which the duty was payable has been inferted, and the duty paid upon fuch larger fum. There has therefore been no fraud upon the public, but the whole which the act required, and even more, has been complied with: and therefore there is no ground for the objection.

LAWRENCE J. Even fuppofing that the exact fum which the mafter had contracted for and was entitled to receive with the apprentice were required by the act to be inferted, ftill the objection would not hold in this cafe. For it appears that five guineas, which is the fum inferted in the indenture, was the fum *contracted* for; and though the mafter has in fact only received four guineas, yet I know no reafon why he may not recover the remainder in an action. The objection would have been more plaufible if four guineas only had been inferted in the indenture, and the duty paid upon that. Taking it however that the four guineas only, which have been in fact received by the mafter, were all he was to have, ftill the words of the act

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have been complied with, requiring the *full sum* paid to be inserted; for here the *full sum* paid and more [illegible] been inserted, and the duty paid upon it. The case [illegible]*rr* v. *Price* does not apply; because there the stamp used was one appropriated to notes of a higher denomination. The stamp duties raised by different acts on different instruments are appropriated to the payment of the interest of different funds; and if the proper stamp appropriated to the specific instrument were not made use of, though an equal or higher stamp, intended for a different instrument, were used, the interest of the fund might turn out deficient for which the duty was imposed. In that case the stamp used was not the stamp required by the act of parliament for a note of that amount. But no such objection arises here: the duty imposed, whether more or less in the particular instance, is all applicable to one fund, and the same description of stamps is required.

Le Blanc J. If the act is to be construed according to the intention of the Legislature, it is clear that such intention has been complied with in this case; and if we look to the words of the act, they will be equally satisfied by what has been done. The intention of the Legislature was to raise a stamp duty in proportion to the sum paid with the apprentice. For which purpose they have required, by *s.* 35. that the *full sum* received or in anywise given, paid, agreed or contracted for shall be inserted; and by *s.* 39. the indenture is avoided in which shall not be inserted the full sum received, or given, paid, secured, or contracted for, "or whereon the duties payable by this "act shall not be duly paid, &c. according to the tenor "and true meaning of this act." Now the *full sum*, according to the tenor and true meaning of the act, has been

inserted; and the *proper stamp* appropriated to this description of instruments has been used; which differs this from the case cited. | 1804. The KING *against* The Inhabitants of KEYNSHAM.

Orders quashed (*a*).

(*a*) Vide *Taylor* v *Hagur*, 2 *East*, 414 S P.

FLEMING, qui tam, *against* BAILEY.

Monday, June 11th.

The stat. 39 *G* 3. c 79 giving a penalty of 20*l.* for printing papers to be published without adding the printer's name and place of abode, directs that any penalty imposed by the act exceeding 20*l* may be sued for in the courts at *Westminster*, and any penalty not exceeding 20*l* *shall and may* be recovered before any justice of peace: but it also gives in the same clause a form of declaration for recovering 20*l.* in the courts of *Westminster* Yet held that a common informer cannot sue for a penalty of 20*l.* in this court, no such power being given by the statute, and there being no power at common law for a common informer to sue for any penalty; and that the form of the declaration must be read *in blank* as to the sum, such form being otherwise inapplicable to a larger penalty before given, and that no such action lay to recover two or more penalties of 20*l.* each.

THE declaration, which was framed on the stat. 39 *Geo* 3. *c.* 79, stated that the defendant was *indebted* to the plaintiff in 60*l.* and then contained three counts, in each of which the plaintiff went for a penalty of 20*l.* under the statute, for printing a certain paper meant to be published and dispersed, and omitting the printer's name and place of abode, as required by *s.* 27. After verdict for the plaintiff,

Lawes on a former day moved, in arrest of judgment, that no action lay by a common informer to recover penalties not exceeding 20*l.* under this statute; for by *s.* 35. "It is enacted that any pecuniary penalty imposed "by this act exceeding the sum of 20*l.* may be sued for "and recovered by any person who will sue for the same "in any court of record at *Westminster*, &c. and any "pecuniary penalty imposed by this act and not exceed-"ing the sum of 20*l.*, and for the recovery whereof no "provision is herein before contained, *shall and may* be "recovered before any justice of peace," &c.

Birch,

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FLEMING, qui tam, against BAILEY.

Birch shewed cause against the rule, and relied on the whole of the 35th clause taken together, as shewing that the intention of the Legislature was that penalties of 20 *l.* might be recovered in the superior courts; for though it first of all says that any penalty *exceeding* 20 *l.* may be so recovered, yet it goes on to say, "in *which* action it *shall* "be *sufficient* to declare or allege that the defendant is "indebted to the plaintiff *in the sum of* 20l. *(being the* "*sum demanded by such* action,)" &c. That shewed that the word *exceeding* had crept into the act by mistake. But giving it its full effect, at least it would not apply to cases where, as here, the plaintiff went for more than one penalty of 20 *l.* [But *the Court* expressing a decided opinion against such a construction of the act,] he contended that the jurisdiction of the superior courts could not be ousted without express words, or by necessary implication; and here no such words or necessity existed. For the 35th section saying, that any penalty *not exceeding* the sum of 20 *l. shall and may* be recovered before any justice of peace, &c. are not words of exclusion of any other jurisdiction, but only give an option to the informer, especially as they are explained by the rest of the clause. And he referred to *Hill* v. *Dechair* (*a*), *Shipman* v. *Henbest* (*b*), and *Rex* v. *Moreley* (*c*); in which latter, though the 6th sect. of the Conventicle Act, 22 *Car.* 2. *c.* 1. says, "that *no other court whatsoever* shall meddle with any causes of appeal upon this act, but they shall be *finally* determined in the quarter sessions *only*;" yet the Court held that the certiorari was not taken away, there being no *negative* words to oust the jurisdiction of this court. The case of

(*a*) *Sty.* 381. (*b*) 4 *Term Rep.* 109. (*c*) 2 *Burr.* 1040.

Cates

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Cates q. t. v. *Knight* (*a*), which went further than any other to oust this court of jurisdiction by implication only, proceeded on the ground that there was a clause giving the justices of peace a power to mitigate penalties of the amount there sued for, over which they had before had express jurisdiction given to them; and that such clause would be rendered nugatory if those penalties could be sued for in the superior courts: but here there is no such clause; and no other necessity for controlling the general rule. The stat. 33 *H.* 8. *c.* 12. *s.* 1. says, that all murders within the King's palaces *shall be* inquired of within the same before the Lord Steward, &c. And the stat. 31 *Eliz. c.* 5. *s.* 7. says, that all suits upon any statute for using any unlawful game, &c. *shall be* sued out at the quarter sessions or assizes, &c.: yet the jurisdiction of this court is holden not to be excluded by those words. 2 *Hawk. c.* 26. *s.* 26—30. [*Lawrence* J. A common informer cannot sue *at common law;* therefore you must shew some clause in the act giving him a power to sue in this particular case.] Sect. 36. enacts, "that *all* pecu-"niary penalties imposed by this act shall, when recovered "*either by action in any court*, or in a summary way before "any justices, be applied, *one moiety to the plaintiff in any* "*such action*, or the informer before any justice, the other "moiety to the King." [*Lawrence* J. That only applies to the penalty *when recovered*, but does not give the informer the original power to sue for it.]

Lord ELLENBOROUGH C. J. A common informer can have no right to sue for any penalty, but where power is given to him for that purpose by the statute. Now the statute in question only says, that a common informer may

(*a*) 3 *Term Rep.* 442.

sue

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sue in any court of record for any pecuniary penalty imposed by the act *exceeding* 20*l.* The penalty given for this offence, each of which must be taken by itself, and cannot be reckoned accumulatively, does not exceed 20*l.*; and therefore it is not within the provisions of the 35th clause, which give an action. And the sense of that clause requires that the form of the declaration there afterwards given should be read the same as if the sum to be recovered were left in blank; for how otherwise can the penalty of 100*l.* given by the 15th section be recovered.

Per Curiam, Judgment arrested.

Tuesday, June 12th.

Mulloy *against* Backer.

The plaintiff contracted to carry the defendant, his family, and luggage, from *Demerary* to *Flushing*, and in the course of the voyage, within 4 days' sail of *Flushing*, the ship was captured by an *English* ship of war, and brought into *England*, and the ship and cargo libelled for prize in the Court of Admiralty, and the cargo condemned, and proceedings still pending against the ship, but the defendant and his family were liberated, and their luggage in fact restored to their possession. Held that, however the question might be as to the plaintiff's right to recover passage-money upon an implied assumpsit pro ratâ itineris if the ship were restored, yet pending the proceedings against the ship as prize in the Admiralty Court, no such action could be maintained; for non constat but that the ship might be condemned and the freight decreed to the captors.

IN assumpsit, tried before Lord *Ellenborough* C. J. at the sittings after last *Hilary* term at *Guildhall*, a verdict was found for the plaintiff for 250*l.*, subject to the opinion of this Court on the following case. In *February* 1803, and before the commencement of the present war with *Holland*, the plaintiff who was the master of a merchant ship called the *Doonhaag*, then lying at the *Dutch* settlement of *Demarara*, agreed with the defendant there to convey him, his family, servants, and luggage, permitting him to have the exclusive use of the cabin, from thence to *Flushing*, for the sum of 2400 guilders, which are equal to *l.* , sterling. In the month of *April* following the ship under the command of the plaintiff, with the defendant,

his

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his family, servants and luggage on board, sailed from *Demarara* destined for *Flushing*, and on her arrival at the entrance of the *British* Channel on the 4th of *July* was captured by his Majesty's armed brig the *Rambler*, and carried into *Plymouth* as a *Dutch* ship, war having been previously declared by his Majesty against the *Batavian* republic. The defendant, his family and servants were set at liberty at *Plymouth*, and their luggage restored to them; but several pipes of wine which the defendant had on board were and still are detained by the captors. The vessel and her cargo have been libelled in the court of Admiralty for condemnation, but no decision as to the vessel (*a*) which has been claimed in that court by a *British* subject as his property hath yet taken place: so much however of the cargo as was the property of *British* subjects has been restored, and the remainder of the cargo has been condemned as lawful prize. The vessel, at the time when she was so captured, had been 65 days on her voyage from *Demarara* towards *Flushing*; and by the usual course of navigation she would have completed her voyage to *Flushing* in four days more. The question for the opinion of the Court was, whether the plaintiff were entitled to recover any and what sum? If the Court should be of opinion that he was so entitled, the verdict for the plaintiff was to stand, or to be altered to such sum as the Court should think fit. If the Court should think that the plaintiff was not entitled to recover any thing, the verdict was to be entered for the defendant.

Richardson, for the plaintiff, contended that he was entitled to recover pro ratâ itineris, according to the princi-

(*a*) It was admitted that since the recovery in this action the vessel had been restored to a *British* claimant.

ples

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ples established in *Luke* v. *Lyde* (*a*); for here the defendant accepted his own liberation and his luggage at *Plymouth*, and did not require the plaintiff to carry him on to the end of his voyage. This was equivalent to the receipt of the goods by the freighter at *Bideford* in that case. "If," says Lord *Mansfield* in that case, "the master has his election to provide another ship to carry the goods to the port of delivery, and the merchant does not even desire him to do so, the master is still entitled to a proportion *pro ratâ* of the former part of the voyage." This case is indeed stronger than that, for there there was no real benefit rendered to the defendant by the partial performance of the contract; but on the contrary he was prejudiced by it; for the freight from *Bideford*, where the goods were accepted, to *Lisbon*, to which they were destined, was greater than from *Newfoundland*, from whence they were originally shipped. Whereas here the defendant has been actually benefited by the partial performance of so much of the voyage, having been conveyed 65 days forward to the place of his destination, and within a very few days sail of it: and the completion of the voyage was prevented by the capture without any default of the master. If it be said that the passengers could not do otherwise than accept their liberty, and that this distinguishes the case from *Luke* v. *Lyde*, where the freighter had an option to accept his goods or not at *Bideford*, still it may be answered that the defendant might have signified his disagreement to accept a partial performance of the contract, by requiring the plaintiff to carry him on to *Flushing* in another ship. In that case the plaintiff had abandoned the ship to the underwriters, and had thereby

(*a*) 2 *Burr*. 882.

prevented

prevented himſelf from carrying the goods in the ſame ſhip; but he was holden to have the option of carrying them on in another veſſel, and thereby earning the whole freight, if the defendant had not agreed to accept them at *Bideford*, and pay only pro ratâ. At any rate the acceptance of the luggage would be evidence of the defendant's aſſent to pay a quantum meruit pro ratâ, taking that to be the only evidence of aſſent which the circumſtances of the caſe give riſe to. The caſe of *Luke* v. *Lyde* came on upon an implied aſſumpſit, and is not contradicted by *Cook* v. *Jennings* (a), where the plaintiff declared on the charterparty, and was holden to be precluded by his preciſe agreement from recovering as for a partial performance, though accepted by the defendant.

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Giles, contrà, contended, 1ſt, that the defendant was not liable to pay the ſum demanded; 2dly, that the plaintiff had not any title to demand it. 1. The contract was entire to convey the defendant from *Demarara* to *Fluſhing* for a certain ſum, and it cannot be ſevered, according to *Cook* v. *Jennings*. [*Lawrence* J. That may depend upon the law of *Holland*; for it was a contract made in a *Dutch* colony, and to be perfected in *Holland*; and therefore whether the plaintiff can recover pro ratâ as for a partial performance of it, muſt depend upon the law of *Holland* in that reſpect.] It does not appear what the law of *Holland* is in this reſpect; and therefore it is ſufficient to ſhew that by the law of this country, by which the plaintiff ſeeks to recover, he is not entitled upon the facts ſtated. *Bright* v. *Cowper* (b) agrees with *Cook* v. *Jennings*, that he cannot recover on the contract itſelf for a partial performance; and *Cutter* v. *Powell* (c) ſhews that he can neither recover on the

(a) 7 *Term Rep.* 384. (b) 1 *Brownl.* 21. (c) 6 *Term Rep.* 320.

the

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the contract, nor on a quantum meruit. The question then is, whether this case comes within the exception of freight, which may be recovered on an implied assumpsit pro ratâ, if the goods be accepted before they arrive at their destined place? The only principle on which the case of *Luke* v. *Lyde* (*a*) can be maintained, is that of an implied contract arising out of a benefit conferred by one party and received by the other: though it is difficult to reconcile the decision in that case with that principle; for there the defendant received no benefit but a detriment from having his goods carried to *Bideford*. [Lord *Ellenborough* C. J. The case of *Luke* v. *Lyde* seems to have proceeded upon an implied contract arising *out of the marine law*.] There was however a consideration in that case; for the master might have refused to deliver the goods at *Bideford*, and might have insisted on performing his contract and earning his whole freight by forwarding the goods to *Lisbon*; and his waving that right, and giving them up to the owner, who chose to have them at *Bideford*, and taking only freight pro ratâ, was a consideration for the promise. [Lord *Ellenborough* C. J. *Lyde* in that case accepted the goods from the *recaptors*, and not from the master; so that the master had no lien on the goods at the time.] If the goods were not considered as given up by the master in that case, there could be no consideration at all for the implied assumpsit: but the case turned on the assumption of the master's right and power to have carried them on to the port of delivery. And that consideration furnishes on the second ground of objection a material distinction between that case and this. For here the plaintiff's *ship* was brought into *Plymouth* as a *prize*, and he himself as a *prisoner of war*. The defendant was not libe-

(*a*) 2 *Burr.* 882.

rated,

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rated, nor his luggage reſtored to him by the plaintiff, but by the captors. There was therefore no conſideration moving from the plaintiff which could be the foundation of an implied aſſumpſit. The cargo has been actually condemned, and at the time when this action was tried proceedings were pending in the Admiralty court for the condemnation of the ſhip, in which event the freight would be due, if at all, to the *captors*; though in theſe caſes it has been moſt uſual to decree the reſtoration of the luggage of paſſengers to them without freight. But in ſtrictneſs the luggage is as much prize as the bulk of the cargo. And at any rate there can be no lien on the *perſon* for the paſſage money, but only on the *luggage*. All the benefit the defendant has received, which is his own and family's liberation and their luggage, was after they were brought into this country as *priſoners*, and from other hands than the plaintiff's. *Paſſage money* as well as *freight* muſt follow the title to the ſhip. [*Lawrence* J. Foreign writers conſider paſſage money the ſame as freight. Lord *Ellenborough* C.J. Except for the purpoſe of *lien* it ſeems the ſame thing.]

Richardſon began to reply upon the firſt point of the argument: but *The Court* ſuggeſted that the difficulty which preſſed moſt on the plaintiff was that he was at any rate premature in commencing this action, *pending* the proceedings in the Admiralty Court to condemn the ſhip as prize, when non conſtat at the time that the ſhip would be reſtored, or that the freight might not be decreed to the captors. To this he anſwered, that the pendency of the ſuit there, which might involve the ſame queſtion, was only matter pleadable in abatement. That by the liberation in fact of the paſſengers and their lug-

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gage all right of the captors was waved, and the parties were reftored to their original relative fituation, from whence it appeared that the defendant had in fact received a certain partial benefit from the plaintiff, for which the law would raife an implied affumpfit on a quantum meruit. That it did not even appear that the defendant was an enemy or amenable to the law of prize.

Lord ELLENBOROUGH, C. J. If this were the cafe of a contract to be decided only according to the law of *England*, without adverting to any rule drawn from the marine law, it would be the cafe of a contract undertaken but not performed, and confequently the plaintiff could not be entitled to recover his wages or hire as for a partial performance of it pro ratâ. But according to the cafe of *Luke* v. *Lyde* the marine law has been imported as it were into this fpecies of contract, and a right to recover wages or freight pro ratâ has been introduced. There it feems an implied contract was raifed, if not on the ground of *beneficial* fervice performed for the defendant, at leaft on the ground of *labour* performed in his fervice by the plaintiff, for which none other but he was entitled to recover. But this is a very different cafe; for here by the capture other rights have intervened and interfere with thofe of the mafter; and pending the difcuffion of thofe rights in a court, which has not only competent but exclufive jurifdiction over the queftion of prize, and which has power to deal with the freight as it thinks proper, this action was brought, which affumes the right to the freight to be in the plaintiff. It is enough therefore to fay that the action is at leaft premature. Pending the fuit in the Admiralty no

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person had a right to restore the passenger's luggage, which in strictness is as much subject to the question of prize as the ship and cargo: and the mere restoration of it de facto by an unauthorized hand cannot affect the right of the captors pending the suit. This distinguishes the case materially from that of *Luke* v. *Lyde*: But when a case like that shall occur, in deference to the authority of those who decided it we should most likely adopt the same rule.

GROSE J. It is clear there can be no recovery on any express contract stated; for there has been no performance of it. Then can we imply a contract to pay the money from any thing which is stated? Now considering the case in the light to which our attention has for some time been confined, it is impossible to state a ground for the plaintiff's recovery. For by the facts stated it appears that the ship is now libelled as prize in the Court of Admiralty, and for aught appears is in a course of condemnation: and if that Court decreed that the earnings of the ship belonged to another, how could this plaintiff be entitled to recover them. The action therefore was prematurely brought.

LAWRENCE J. This action was at any rate brought too soon pending the proceedings in the Admiralty Court, where it is admitted that freight may be directed to be paid to the captors when goods are restored to the claimants: and if passage money stand on the same footing, the plaintiff, whose ship has been taken as prize, and who in case of condemnation may lose all claim to freight for goods, cannot now claim a compensation for the defendant's passage.

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Le Blanc J. It is not neceſſary to give any opinion upon the caſe of *Luke* v. *Lyde*; for as this caſe now ſtands the plaintiff cannot at any rate recover in this action. Suppoſing this were a caſe for the freight of goods only, which have been ſtopped in the courſe of their voyage and carried to another place, then by aſſimilating it to the caſe of *Luke* v. *Lyde* the plaintiff contends that he is entitled to recover pro ratâ for the freight, not on the ground of the original contract, but by reference to the marine law, on which the Courts have ſhaped a courſe to recover for a benefit to the defendant which made part of the original contract. That was the footing on which the caſe of *Luke* v. *Lyde* was put; that though the maſter could not recover on the original contract which was not performed; yet that he might recover upon an implied aſſumpſit for a benefit already conferred on the defendant; which in that caſe was implied from the acceptance of the goods by the defendant at the port into which they were carried. But here no benefit can be implied to the defendant from the plaintiff. For the plaintiff is a priſoner of war, and incapable of performing his contract; and every thing connected with his ſhip and the benefit to be derived from it is transferred to another by the capture, or at leaſt it may be ſo, which cannot be known pending the ſuit in the Court of Admiralty. Therefore till reſtitution be awarded I cannot conceive how any cauſe of action can ariſe to the plaintiff. If the ſhip had been condemned there it is clear that the plaintiff could not have recovered.

It was thereupon agreed that a

Nonſuit ſhould be entered.

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The KING *against* The LEEDS and LIVERPOOL Canal Company.

Wednesday, June 13th.

Where goods are carried along two different lines of canal, one of which is by statute exempted from being rated in respect of the tolls, and the other not; tho' the voyage happen to finish on the unexempted line where the tolls become due and are received, yet the Canal Company shall not be rated for more than such proportion of the tolls as accrued in respect of the carriage along the unexempted line. And the toll arising in respect of so much per ton per mile is to be rated only for so many miles as the goods were carried along the unexempted line. And where the act directs that the *tolls* should be exempt from any taxes, rates, &c. other than such as the *land* which should be used for the purpose of the navigation would have been subject to if the act had not been made; that goes to exempt the *tolls* quà *tolls* altogether from being rated in respect of the line so exempted, leaving the *land* rateable as before.

THE defendants appealed to the quarter sessions at *Preston* in *Lancashire* against a rate made in *December* last for the relief of the poor of the township of *Habergham Eaves* in that county, whereby they were rated for a warehouse and land occupied with it 9*s.* 6*d.* and for the *rates, tolls, and duties* arising from the navigation to the said Company within the said township of *Habergham Eaves*, 40*l.*, being a rate made upon the sum of 1352*l.* 12*s.* 4*d.* On hearing the appeal the Sessions confirmed the rate, subject to the opinion of this Court as to the last charge, to which the appellants confined their objections, on a case stating in substance,

That the rate was duly allowed and published. That by stat. 10 *Geo.* 3. the incorporated company of proprietors of the canal navigation from *Leeds* to *Liverpool* were enabled to make a navigable canal from *Leeds* to *Liverpool*, and to take *a certain sum per mile* for the tonnage and wharfage of goods navigated thereon, and so in proportion for any greater or less quantity than a ton; which rates were to be paid to such persons at such places near the canal, in such manner, and under such regulations, as the Company should appoint. It was also enacted "that the said *tolls, rates and duties* should at all times "thereafter *be exempt from the payment of any taxes, rates,* "*assessments, or impositions whatsoever*, any law or statute

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"to the contrary notwithstanding, *other than such taxes,* "*rates, and assessments as the land which should be used for* "*the purpose of the said navigation would have been subject* "*to if this act had not been made.*"

By another act of the 23 *Geo.* 3. incorporating the said canal navigation with the river *Douglas* navigation, which had been made navigable under the authority of an act passed in the 6 *Geo.* 1., and then purchased of the proprietors of the said river navigation by the *Leeds* and *Liverpool* Canal Company, it is enacted, "that the several "navigations, cuts, or canals, and every part thereof, and "the said tolls, rates, and duties to be taken upon the "same, or any part thereof, under the authority of this "or either of the aforesaid acts should at all times be "*exempt from the payment of any taxes, rates, assessments, or* "*impositions whatsoever, other than and except such taxes,* "*rates, and assessments as the land which had been or should* "*be used for the purposes of such navigations, cuts, or canals* "*were or would have been subject to if this act had not been* "*made:* and that such navigations, cuts, or canals, should "not be subject or liable to the payment of any taxes, "rates, or assessments, save and except such taxes, rates, "and assessments as had been and then were usually "charged and assessed thereon, any law or statute to the "contrary notwithstanding. But nothing in this clause "to exempt any quay, wharf, warehouse, or other house, "from the payment of any taxes, rates, or assessments. "And it is enacted, that the clause in the said act "10 *Geo.* 3. exempting the tolls, rates, and duties arising "from the said canal from assessments should be repealed." The said canal navigation was completed under these acts and another act of the 30 *Geo.* 3. from *Leeds* to *Wanless Banks*, a distance of 47 miles 6 furlongs: when it being

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found desirable to make a deviation in the then parliamentary line, by another act of the 34 *Geo.* 3. the Company were empowered to make a deviation and cut from the former line from *Wanless Banks* through several townships therein mentioned, and amongst others *Habergham Eaves*, to communicate with the *Douglas* navigation at *Wigan*, and the Company were authorized to take for tonnage and wharfage of goods, &c. navigated thereon, a *certain sum per mile*, and so in proportion for a greater or less quantity than a ton; to be paid to such persons, at such places, &c. (as before) as the Company should direct. And that every fraction of a mile should, in ascertaining the rates, be deemed a whole mile. And it incorporates all clauses, powers, authorities, provisoes, and exemptions, &c. contained in the acts of the 10th *Geo.* 3., not repealed by the acts of the 23d and 30th *G.* 3. or by this act; and also incorporates all clauses, &c. in the act of the 23d *Geo.* 3. relating to the *Leeds* and *Liverpool* canal not repealed by the act of the 30th *Geo.* 3. or by this act; and also all clauses, exemptions, &c. in the act of the 30th *Geo.* 3. relating to the *Leeds* and *Liverpool* Canal, not repealed by this act, *except* so much of the said acts as enables the said Company to deviate the line of the said canal from *Leeds* to *Liverpool*, *and to exempt the tolls, rates, and duties therefrom arising from the payment of any taxes, rates, assessments, or impositions whatsoever*, &c. Under the powers of the stat. 34 *Geo.* 3. so much of the said canal navigation has been completed in the varied line of deviation as extends from *Wanless Banks* aforesaid through a number of townships (and amongst others *Habergham Eaves*) to a place called *Henfield Common*, in the township of *Clayton le Moors*, being a distance of 14 miles and 7 furlongs. In the township of *Habergham Eaves*

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the Company have erected a warehouse, where goods from all parts of the canal are landed, having passed as well upon the canal made under the authority of the acts of the 10th, the 23d, and 30th *Geo.* 3. as the deviation made under the authority of the stat. 34 *Geo.* 3.; and the tonnage of such goods so landed there amounted, from the 1st of *January* to the 31st of *December* 1803, to 1352*l.* 12*s.* 4*d.*, of which 240*l.* 17*s.* 4*d.* is the proportion arising from the navigation of that part of the new line of canal made by virtue of the act of the 34th *Geo.* 3. That part of the canal which lies in *Habergham Eaves* has cost in making and completing 46,548*l.* 19*s.* 0*d.*; and the average annual expenditure of the Company for repairs, damages, taxes, wages, and expences relating to that part of the canal made by virtue of the stat. 34 *Geo.* 3. and the part communicating therewith at *Wankss Banks*, made under the authority of the said acts of the 10th, 23d, and 30th *Geo.* 3., and the proportion of the average annual expenditure of the Company for the committees and salaries and expences of the concern at large, belonging to the above-mentioned parts of the canal, amounting to 362*l.*: but no deduction was made in respect of such last-mentioned sum from the amount of the tolls, rates, and duties upon which the rate was made. Notes or bills of lading are delivered by the masters, &c. at various places upon the line of the canal appointed by the Company, one of which is *Habergham Eaves*; and such notes are transmitted by the warehouse-keeper there to the chief office of the Company in *Bradford*, where a particular of each person's tonnage and rates is made out, and which is afterwards collected by the Company's agents from such persons, at their places of abode, wherever they may be, or is paid at the chief office of the Company at *Bradford*;

ford; but no part of the canal paſſes through the townſhip of *Bradford*. The Company are not carriers upon the canal, nor the owners of any veſſels employed thereon. The Seſſions being of opinion that the appellants were rateable for the relief of the poor of *Habergham Eaves* for all the tolls ariſing upon goods diſcharged within *Habergham Eaves*, although carried as well upon the canal made by virtue of the acts of the 10th, 23d, and 30th *Geo.* 3. in the original line, as upon the deviation made under the authority of the ſtat. 34 *Geo.* 3., and that, without making any deduction from the amount thereof in reſpect of the ſum of 360*l.* for repairs, wages, and other outgoings, confirmed the rate.

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Scarlett and *Becket*, in ſupport of the order of Seſſions, contended, firſt, that the *tolls* were not exempted from being rated; but only the *quantum* of the rate was limited by the clauſe of exemption to what the *land* uſed for the navigation would otherwiſe have been ſubject to. And they referred to *Rex* v. *The Undertakers of the Aire and Calder Navigation* (*a*), to ſhew that a clauſe of exemption of this kind did not limit the quantum of the rate to what it was at the time of paſſing the act; but that the quantum would vary with the improvement of the land. [*Lawrence* J. The meaning of the clauſe of exemption clearly is that the *land*, quà *land*, ſhall not be exempted, but that the *tolls* ſhall be exempted.] Then, 2dly, The exemption does not apply to any part of the tolls which ariſe within the new and unexempted line of canal. It has been determined that tolls are only rateable where they become due, and they do not become due, nor have any exiſtence *as tolls* until the completion of the voyage for

(*a*) 2 *Term Rep.* 660—4.

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which the goods are contracted to be carried. Till then the ſubject-matter of the exemption cannot be ſaid to exiſt. Theſe tolls, therefore, not ariſing and becoming due till the goods arrived at a place beyond the line of exemption, the exemption does not attach upon them. And they cited *Rex* v. *Aire and Calder Navigation* (*a*), and *Rex* v. *Page* (*b*), and *Rex* v. *The Staffordſhire and Worceſterſhire Canal Navigation* (*c*), as in point; particularly the latter, where the Company were entitled to take ſo much per ton *per mile*, as in this caſe, and where they did *in fact* collect the tolls at intermediate pariſhes in the courſe of the voyage, and yet it was holden that the tolls were only rateable in the ſeveral pariſhes *where they became due*, which was *where the reſpective voyages finiſhed*.

Topping and *Wood* contrà were ſtopped by the Court.

Lord ELLENBOROUGH C. J. I agree with the principle of thoſe caſes, that the toll is only due and can only be taxable, if at all, at the place where the voyage ends for which the goods were contracted to be carried, and that it is not to be portioned out amongſt the ſeveral pariſhes through which the goods may intermediately paſs: but where the legiſlature have expreſsly exempted a particular line of navigation from being rateable in reſpect of the tolls, along which line the goods have been carried in reſpect of which in part the toll is calculated, there is nothing which ſhould prevent us from giving effect to this exemption by ſaying that where the toll is received, it may be taxed for that proportion of it accruing along the line which is taxable, but that it ſhall

(*a*) 2 *Term Rep.* 660—4. (*b*) 4 *Term Rep.* 543.
(*c*) 8 *Term Rep.* 340.

not

1804.

The KING against The LEEDS and LIVERPOOL Canal Company.

not be taxed for that proportion which accrued along the line which is exempted. Now here a rate has been made taxing the tolls altogether, without diſtinguiſhing between the different parts which are exempted or not exempted: that cannot be ſupported. We cannot apportion it; thoſe who make the rate ſhould apportion it. The rate, as it is, cannot be ſupported. The word *exempt* may be taken to mean *precluded from being chargeable.* The meaning of the clauſe of exemption was, that the land or ſpace occupied by the canal ſhould be liable to be taxed as it was before, that is as *the land* was before: but the *tolls* were not rated before, for they had no exiſtence; and therefore are exempted.

GROSE J. In order to tell whether the tolls are rateable or not, it muſt be ſeen from whence they aroſe. One line of the navigation is exempted from being rated in reſpect of its tolls, and another not. Then ſuch proportion of the toils as have accrued along the exempted line is not liable to be rated let it be due or received where it will; otherwiſe the exemption which the legiſlature have holden out to the company would be a mere trick and may become nugatory.

LAWRENCE J. As to the exemption itſelf, the object of the clauſe was to take care that when the company were engaging in a hazardous undertaking which was conſidered to be beneficial to the public, they ſhould not be liable to any other taxes than thoſe which the land they made uſe of in their undertaking was before liable to. Now the *land* was not before liable to be rated for *toll;* and therefore the proprietors ſhall not be liable now to a rate *on tolls* in reſpect of it when converted into a canal.

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The King against The Leeds and Liverpool Canal Company.

canal. But this does not go to exempt the land from paying what it did before. Upon the other point I fully accede to what has been said. The toll must be apportioned pro ratâ itineris for so much of it as accrued on the unexempted line, and that proportion only is liable to be rated where it becomes due.

Le Blanc J. I am of the same opinion. We cannot adopt any other construction without totally defeating the object of the legislature in giving the exemption. And this may be done without difficulty. The land will be rated in the same manner as it was before the act. The tolls will be rated where they become due; but in calculating the quantum of toll which is the subject of the rate, allowance must be made for so much of the toll as accrued in respect of the line exempted. For instance, if two-thirds of the line are exempted, then tolls which have come along the whole line to *Habergham Eaves*, will only be liable to be rated in the proportion of one-third. So if the goods have been carried 15 miles, five miles of which are not exempt, they must be rated only for those five miles; and so in proportion. It will be easy therefore in all cases to calculate the proportion of tolls which are rateable, according to the number of miles which the goods have been carried along the exempted and unexempted lines of the canal.

Rate on the tolls quashed.

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The KING *against* The Inhabitants of DENBIGH. *Wednesday, June 13th.*

One may gain a settlement by renting a tenement of above 10*l.* a-year in the parish where he *resided*, tho' such residence were *in a turnpike-house*, as servant to the collector for whom he received the tolls; for the general turnpike act 13 *Geo.* 3. *c.* 84. *f.* 56. only says that "no gate-keeper or person *renting the tolls and residing in the toll-house* shall *thereby* gain a settlement, *i. e.* by such taking of the toll-house or renting the tolls.

TWO justices removed *Robert Hughes*, his wife, and children, by name, from the parish of *Denbigh* to the parish of *Heullan*. The Sessions on appeal quashed the order, subject to the opinion of this Court on the following case.

The paupers being legally settled in *Denbigh*, on the 14th of *May* 1802 *Robert Hughes* agreed with the toll-taker in *Heullan* to go and receive the tolls in the turnpike house in *Heullan*, as the servant and for the use of the toll taker; for which he (the pauper) was to be paid 3*s.* 6*d.* per week. The pauper went there accordingly; and in about a fortnight afterwards, while he was at the turnpike gate house, took from one *Evans* a field in *Heullan* at the rent of 12*l.* a-year, and gave him 6*d.* earnest. The pauper continued in possession of that field for two or three months, and resided day and night during that time with one of his children at the turnpike gate house. In the course of two or three months after the pauper had taken the said field, *Evans* coming by the turnpike gate told the pauper that he was uneasy on account of the rent, and asked the pauper to give him some security, to which the pauper answered that he could not give him any security, but had no objection to give up the field, and he did then give it up accordingly. The pauper took the field for the purpose of getting hay and grass to keep his mare, but he never reaped any benefit from the field, nor did he turn his mare into it, because the hay was growing. The pauper continued at the turnpike gate house for 12 months after he had given up the field, receiving for part of that time 4*s.* 6*d.* and latterly 5*s.* per week from the taker of the turnpike gate as aforesaid. The

pauper's

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pauper's wife and three of his children lived during that time in a houſe in *Denbigh*, for which the pauper paid 3*l.* 3*s.* per annum; but they ſometimes ſlept with him at the turnpike. The turnpike gate houſe is the property of the commiſſioners of the turnpike road, but is always ſet with the tolls to the toll taker, and was ſo ſet while the pauper lived there and received the tolls there for ſuch toll taker as aforeſaid.

The Seſſions was of opinion that the pauper had bonâ fide holden lands to the value of 10*l.* a-year in the pariſh of *Heullan* for above 40 days, and lived during ſuch holding at the ſaid turnpike gate houſe, as before ſtated; but reverſed the order of removal in this caſe on the ground of the act of 13 *Geo.* 3. *c.* 84. *ſ.* 56. which enacts, "That no gate-keeper of any turnpike-road, or perſon "renting the tolls thereof, and reſiding in any toll-houſe "belonging to the ſaid truſt, ſhall be removeable from ſuch "toll-houſe, &c. unleſs he ſhall become actually charge-"able to the pariſh, &c. in which ſuch toll-houſe is "ſituate. And that no ſuch gate-keeper, or perſon "renting ſuch tolls, and reſiding in ſuch toll-houſe as "aforeſaid, ſhall *thereby* gain a ſettlement in any pariſh "or place whatſoever; and that no tolls to be taken at "any gate erected or to be erected by the truſtees of "any turnpike road, nor any toll-houſe erected or to be "erected for the purpoſe of collecting the ſame, nor any "perſon in reſpect of ſuch tolls or toll-houſe, ſhall be "rated or aſſeſſed towards the payment of any poor's "rate or any other public or parochial levy what-"ſoever."

Conſt and *Scarlett*, in ſupport of the order of ſeſſions, obſerved that the legiſlature, by providing that no *gate-*

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keeper or renter of tolls *residing in any toll-house* should *thereby* gain a settlement, meant not only that the *renting of the tolls* should not gain him a settlement, but that the *residence in the toll-house* should not be contributable to a settlement: now here it would be contributable to a settlement by giving him a residence in the parish, if that would suffice.

The Court however thought the case too clear for further argument; and Lord *Ellenborough* C. J. said, the act only says that a gate-keeper shall not *thereby* gain a settlement, that is, by keeping the gate or *renting the tolls* and residing in the toll-house. But that does not prevent him from gaining a settlement aliundè in the same parish where the gate-house is situated. This man did not gain a settlement by renting the tolls or by keeping the gate, but by renting a close in the parish worth above 10*l.* a-year for more than 40 days, and residing in the same parish. He did not even rent the tolls: he was no more than a mere servant to collect the tolls for another.

Per Curiam, Order of Sessions quashed.

Erskine, *Topping*, and *Benyon* were to have argued against the order of Sessions.

The KING *against* The Inhabitants of WAKEFIELD.

Wednesday, June 13th.

The Sessions having decided in favour of a settlement in *A.* by which the pauper's father was proved to have been *relieved while resident in another parish* 40 years ago, and before the pauper's birth, and the only evidence to oppose this being that of the pauper's own *birth* in *B.*, this Court confirmed the order of Sessions on a case reserved.

TWO justices removed *Mary the wife of* George Fielding, *and her five children*, by name, from the township of *Alverthorpe with Thornes* to the township of

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Wakefield, both townships being within the parish of *Wakefield* in the county of *York*, and maintaining their own poor separately. On appeal the Sessions confirmed the order of removal, subject to the opinion of this Court on the following case. The respondents, in support of the order of removal, proved that the appellants had at various times during forty years past relieved *George Fielding*, the father of *George Fielding*, the husband of the pauper *Mary*, and different members of his family, some by being taken into the appellant's workhouse, and some in otherways during the time that they resided in the township of *Stanley*, and had provided coffins for and defrayed the expences of the funerals of some of the family. It was also proved that *George Fielding*, who is now 38 years old, the husband of the pauper *Mary*, and father of the other paupers, was born and has always lived in the township of *Alverthorpe with Thornes*. The above was the only evidence given in support of or against the order of removal.

Gibbs and *Wood* in support of the order of Sessions. The giving relief to a pauper's family, while resident *out of the township* so relieving, is good evidence of a settlement there, especially for so long a time as 40 years. This shews that the relief was not given to them as *casual poor*; for that the paupers could only have been entitled to in the parish in which they lived at the time. Then admitting that the birth of *George Fielding*, the husband of the pauper *Mary*, in *Alverthorpe* was, if it had stood alone, primâ facie evidence of a settlement there; yet it was the province of the Sessions to decide upon the weight of evidence, and their conclusion must decide the settlement.

Topping

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Topping and *Lambe* contrà. The principal queſtion was as to the ſettlement of *George Fielding* the huſband of the pauper *Mary*, and the father of the other paupers. A derivative ſettlement is only to be reſorted to upon failure of any evidence of the party's own ſettlement. Here the place of birth was primâ facie evidence of the huſband's ſettlement, and could not be gotten rid of by mere preſumptive evidence of his father's ſettlement at an antecedent time. If indeed the huſband himſelf had been proved to have received relief while reſiding out of his townſhip, it would have rebutted the preſumption of ſettlement from the place of his birth; though the fact of receiving relief from the pariſh where a party reſides is not even primâ facie evidence of ſettlement according to *R.* v. *Chadderton* (*a*). It is not ſtated here when the relief was given to the father's family; it ſhould have appeared at leaſt that it was given before the pauper's huſband was an adult, and was emancipated from his father's family.

Lord ELLENBOROUGH, C. J. The relief was given by the townſhip of *Wakefield* to the *father* of the pauper's huſband and to different members of *his* family, which muſt mean the family of the pauper's huſband's father: and this while they were reſiding in another townſhip. This was *evidence* of the father of the pauper's huſband's ſettlement in *Wakefield* at that time: and this is ſtated to have been done at different times during the laſt 40 years; the particular periods are not material; for no other ſettlement has been eſtabliſhed ſince: and all things are preſumed to continue in the ſame ſtate unleſs ſome-

(*a*) 2 *Eaſt*, 27.

1804.

The King *against* The Inhabitants of Wakefield.

thing be ſhewn to the contrary. Then the only evidence ſet up againſt this is that of the birth of the pauper's huſband in *Alverthorpe*, which is no more than primâ facie evidence of a ſettlement there. Then if there were evidence on both ſides the Seſſions were to decide on it.

Grose J. There was primâ facie evidence on both ſides, on the weight of which the Seſſions were to determine.

Lawrence J. I am of the ſame opinion. The father was relieved 40 years ago by the townſhip of *Wakefield*, which muſt have been before the birth of the pauper's huſband who is now only 38 years old.

Le Blanc J. The leaſt that can be ſaid is that there was evidence on both ſides; but the place of birth is the weakeſt evidence of ſettlement.

Orders confirmed.

Friday, June 15th.

Walters *againſt* Frythall.

An application to make the plaintiff, who reſided abroad, give ſecurity for the coſts, refuſed after notice of trial given, as the defendant might have applied earlier after knowledge of the fact of the plaintiff's reſidence, and before ſo much of the coſts incurred.

A. Moore moved again for a rule (which had been mentioned the day before) calling on the plaintiff to ſhew cauſe why he ſhould not give ſecurity for the coſts in caſe he was nonſuited or the defendant obtained a verdict; on the ground that the plaintiff was living in *Jerſey*, and that the action was brought at the inſtigation of his wife's friends, (ſhe living apart from her huſband,) without his knowledge or conſent. In this caſe iſſue was joined and notice of trial given. And he referred to

Barker

1804.

WALTERS *against* FRYTHALL.

Barker v. *Hargreaves* (a), where a ſimilar rule was granted after notice of trial given; though objection was taken that the application ſhould have been made ſooner.

The Court however ſaid that the better rule, and ſuch as was moſt conſonant to the practice, was that the application ſhould be made as ſoon as the defendant reaſonably could do it after knowledge of the fact of the plaintiff's reſidence abroad; that otherwiſe if he waited ſo long till after notice of trial given and coſts incurred, the granting of ſuch a rule would be in effect to compel the plaintiff's attorney to give the ſecurity required. Therefore, becauſe the defendant might have come earlier,

Rule refuſed.

(a) 6 *Term Rep.* 597.

The KING *againſt* PATCHETT.

Saturday, June 16th.

By the vagrant act 17 *Geo.* 2. *c.* 5. after a rogue and vagabond has been committed to the Seſſions, and they, adjudging him to be *a rogue and vagabond*, order him to be further impriſoned and kept to hard labour for ſix months, and to be publicly *whipped* during that time, and that after the expiration of his impriſonment he ſhould be *ſent and employed in his Majeſty's ſervice purſuant to the ſtatutes*, &c. held that the whole forms one ſentence, and ſuch order being defective in the latter part for want of adjudicating whether the party were to ſerve his Majeſty *by ſea* or *land* as diſcriminated in the ſtatute, the conviction ſhall be quaſhed; though the former part of the ſentence, adjudging the *rogue and vagabond* to be *whipped*, be valid.

A CONVICTION of the defendant under the act of the 39 & 40 *Geo.* 3. *c.* 50. for extending the proviſions of the vagrant act 17 *Geo.* 2. *c.* 5. being returned by certiorari into this Court; the information ſtated that one *J. G.* informed *P. S.* clerk, one of the juſtices of the peace for the county of *Leiceſter*, that the defendant and another perſon were found in a plantation in the lordſhip of *Preſtwould* in the ſaid county in the night, &c. having nets, engines, and other inſtruments for the purpoſe and with intent to deſtroy game, &c. contrary to the form of the ſtatute. Then after ſtating the ſummons of the de-

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The King *against* Patchett.

fendant, his appearance and pleading not guilty, and the proof of the offence by one witnefs, the record proceeded, " and thereupon the defendant on, &c. before the juftice, " &c. on oath, &c. is *convicted, and he is hereby deemed to " be a rogue and vagabond* within the meaning of the " ftatute 39 & 40 *Geo.* 3. In witnefs &c." There was alfo returned an order of the Quarter Seffions of the fame county, holden the 10th of *January*, 44 *Geo.* 3. ftating that the defendant was brought before that Court in the cuftody of the keeper of the Houfe of Correction, when it appeared to the Court that the defendant was charged, &c. (as before mentioned). And ftating further that it appeared to the faid Court by the warrant of commitment under the hand and feal of the faid *P. S.* clerk, fo being fuch juftice as aforefaid, dated 1ft *November* 1803, that the defendant was by the faid juftice committed as a rogue and vagabond to the keeper of the faid houfe of correction, &c. there to remain until the next Seffions, &c. or until he fhould be difcharged by due courfe of law: whereupon the defendant being under fuch commitment before this Court, being the next, &c. the faid Court doth proceed to examine the circumftances of the cafe. (Then after ftating the examination of the witnefs proving the offence, and that the defendant when called on made no defence.) The Court therefore confidered and adjudged that the defendant was and is *a rogue and vagabond*, and that he fhould be detained and kept in the houfe of correction, &c. to hard labour for fix months, and that during fuch imprifonment he fhould be once publicly whipped, &c. and at the expiration of fuch imprifonment the defendant, being above the age of 12 years, was further ordered to be fent and

employed

employed *in his Majesty's service pursuant to* the statutes in such case made. 1804.

The KING *against* PATCHETT.

Balguy objected to the conviction; 1st, *the Sessions* have adjudged the defendant to be *a rogue and vagabond*, and yet in addition to the imprisonment have ordered him to be *whipped*; whereas by the vagrant act 17 *Geo.* 2. *c.* 5. *the Sessions* have only authority to order one whom they adjudge to be *an incorrigible rogue* to be *whipped*. That act describes three classes of offenders; 1. Idle and disorderly persons; 2. Rogues and vagabonds; 3. Incorrigible rogues. Over the two first classes a single magistrate has jurisdiction to act, and may punish them; but cognizance of the latter is referred to the Sessions. In regard to *rogues and vagabonds*, a single magistrate may by *s.* 7. either order them to be publicly whipped and passed to their parish, or to be sent to the house of correction until the next sessions, or for any less time. If committed to the sessions, and that Court "shall, on "examination of the circumstances of the case, adjudge "such person a *rogue and vagabond*, or *an incorrigible rogue*; they may, if they think convenient, order *such* "*rogue or vagabond* to be kept in the house of correction "to hard labour for any further time not exceeding six "months." (Here ends the further punishment of *a rogue and vagabond*.) "And *such incorrigible rogue* for any "further time not exceeding two years nor less than six "months from the time of making such order of sessions; "and during the time of *such person's confinement*" (this must relate to the last antecedent, viz. such *incorrigible rogue's* confinement) "to be corrected *by whipping* in "such manner, time, and place, &c. as they shall think "fit. And *such person* may afterwards be sent away by

 "such

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"such pass, mutatis mutandis, as aforesaid. And if *such* "*person* being a male is above the age of 12 years the "Sessions may at any time before he is discharged from "the house of correction send him to be employed in "his Majesty's service, either *by sea or land* if they shall "see proper."

The Court suggested a difficulty in adopting this construction; for if the words "*such person*" which occur in the latter part of the clause are to be referred to an *incorrigible rogue* only, there will be no provision made for the passing of a *rogue and vagabond* by the Sessions after his imprisonment, which the evident intention and policy of the act requires, in order to prevent vagrancy. Upon this ground the Court inclined to think that *such person* referred as well to a *rogue and vagabond* as to an *incorrigible rogue*, and consequently that the Sessions had power to order both descriptions of offenders to be *whipped* and to be *passed* after the expiration of their imprisonment.

Balguy said in answer that the adjudication of one to be an *incorrigible rogue* of course comprehended him under the description of rogue and vagabond, being a higher description of offender of the same sort; and therefore any single magistrate out of sessions had the power of passing him to his parish after the expiration of his imprisonment. [Lord *Ellenborough* C. J. That is not so clear; for the power of a magistrate out of Sessions to pass a rogue and vagabond seems connected with the punishment of whipping or confinement which has been inflicted under *his own order*: for the 7th section says, "And *after such* "*whipping or confinement, such* justice or justices may and "are

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The KING *against* PATCHETT.

" are hereby empowered, if they think fit, by a pass under " hand and seal in the manner and form hereafter di- " rected to cause *such persons* to be conveyed, &c." It does not appear to refer to any independent order to pass.] Secondly, the Sessions have only adjudged the defendant *to be employed in his Majesty's service* after the expiration of his imprisonment, and they have not discriminated whether such service is to be *by sea* or *land*, as mentioned in the act. This is part of the adjudication, and ought to be done at the same sessions by which the rest of the sentence is pronounced. But even if this part of the punishment may be adjudged at any subsequent sessions during the imprisonment, still it can only be done once, and here it has been already done, but done defectively; and therefore the error cannot be rectified at any future sessions.

Vaughan Serjt. contra, (being called upon to answer this last objection) relied on the words of the statute, " that the justices at their sessions may and are hereby " empowered *at any time before he is discharged from the* " *house of correction* to send him to be employed in his " Majesty's service, either by sea or land, if they shall " judge proper." This was a discretionary power given and meant to be exercised or not according to circumstances, such as good behaviour during confinement, probability of amendment, or the like. But if it were not so, here is a sufficient adjudication of the sessions that *he should be employed in his Majesty's service pursuant to the statutes*, that is, either by sea or land, as the crown or its officers should think proper, or the subject be best adapted for. There is no necessity for limiting the discretion or convenience of the Crown in this respect. At

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any rate, fuppofing this part of the adjudication defective, it will not vitiate the reft which is good.

Lord ELLENBOROUGH C. J. The judgment is entire and cannot be fplit. A particular jurifdiction is given to the Seffions; whenever they begin to act upon it and to make their order, they muft make an effective order. Quacunque viâ datâ this is wrong, whether this direction to employ the offender in his Majefty's fervice is to be made part of the fentence or not: if it were not to be part of the fentence, the Seffions have done wrong in making it fo: if it were, they have not done it effectually, by not having afcertained in which fervice, whether at fea or by land, the defendant was to be employed. The ftatute certainly meant that the juftices fhould exercife their difcretion in this refpect, as well as in determining whether he fhould be employed at all or not in the fervice. Upon this ground we think the conviction cannot be fuftained. As to the other point, we do not think the objection well founded; for upon reading the claufe we think that the words "*fuch perfon*" refer to "*any offender* againft the act" defcribed at the beginning of the claufe, who fhall be committed to the feffions. That is evidently the meaning in the firft place where thofe words occur in the claufe; where it fays that when "*any offender* againft this act fhall be committed, "&c. to the feffions, and the juftices at fuch feffions "fhall, on examination, &c. adjudge *fuch perfon* a rogue "or vagabond, or an incorrigible rogue, &c."

On the fecond objection therefore

Per Curiam, Conviction quafhed.

1804.

GOULD *against* GAPPER, Clerk (*a*).

Thursday, June 7th.

Where the spiritual court incidentally determines any matter of common law cognizance, such as the construction of an act of parliament, otherwise than the common law requires, prohibition lies after sentence; altho' the objection do not appear upon the face of the libel, but is collected from the whole of the proceedings below.

IN prohibition the plaintiff declared, that whereas the trial of the bounds of parishes and of prescriptions and customs has immemorially been by the common law, and not by the ecclesiastical law; and that during the year 1797 and the two following years the plaintiff had occupied lands which were lately parts of a tract of waste land called *King's Sedgemore* in the county of *Somerset*, and which had been lately inclosed allotted and divided under an act of the 31 *Geo.* 3.; and which lands so occupied by the plaintiff until the allotting and dividing, &c. were not within the parish of *High Ham* in the said county, or the titheable places thereof, but was extra-parochial. And that there is a saving in that act of the rights of the Crown. And that within the parish of *High Ham* there has been immemorially a modus of 2*d.* an acre for all meadow land, in lieu of tithe of hay and agistment, and of 1½*d.* for every milch cow depastured in such land, in lieu of tithe of milk and agistment, and of 1*d.* for every heifer depastured on the same, in lieu of agistment tithe; yet the defendant, rector of the parish of *High Ham*, to aggrieve the plaintiff and disinherit the Crown, and to bring the cognizance of a plea which belongs to the Crown to another sort of trial in the consistorial court of the archdeaconry of *Wells*, exhibited his libel in the said court against the plaintiff, alleging that in the year 1797 and the two following years the defendant was rector of *High Ham* and the proprietor of the tithes, and that the plaintiff during that time occupied the said meadow lands in the

(*a*) Vide the report of this case on the motion for the prohibition, 3 *East*, 472.

said

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faid parifh, and mowed and received the hay therefrom, and depaftured unprofitable cattle there, and ploughed the faid other lands there and fowed them with corn, for which tithe was due to the defendant. That the plaintiff pleaded in his defence to the libel the matters above fuggefted, and offered to prove the fame by evidence. That the defendant by way of perfonal anfwer denied that the faid lands were extra-parochial, becaufe the proprietors of lands in the adjoining parifhes, of which *High Ham* was one, claimed rights of common on *King's Sedgemoor*, as appurtenant to their refpective tenements, and that *King's Sedgemoor* was parcel of the faid feveral parifhes adjoining, though the precife bounds of each were not certainly known. And further the defendant alleged, that *King's Sedgemoor* was not mentioned in the faid act as extra-parochial, but that the fame was therein ftated to be in, near, or adjoining to the feveral parifhes mentioned, of which *High Ham* was one; and that the commiffioners under the faid act allotted *King's Sedgemoor* amongft the feveral parifhes mentioned, which had rights of common thereon; and that they allotted part of *King's Sedgemoor*, adjoining to the old inclofures of *High Ham*, to the faid parifh, for the rights of common appurtenant to certain tenements in *High Ham*, and other part of *King's Sedgemoor* they allotted to *Low Ham*, alleged to be a hamlet of *High Ham*. That the defendant by his faid anfwer further alleged, that by an act of the 37 *Geo.* 3. the parcels of meadow and land in queftion in the occupation of the plaintiff were allotted in refpect of fome of the rights of common appurtenant to fome of the tenements in the parifh of *High Ham* and hamlet of *Low Ham*, and were parcels of the allotments made under the laft-mentioned acts; and that the fame were within the bounds of the

parifh

parish of *High Ham*. And the defendant further alleged, that by the said act secondly abovementioned it was enacted, that all the lands which should be allotted by virtue thereof should be held under and subject to the same charges, tenures, customs, suits, services, and incumbrances as the tenements in respect of which such allotments were made would have been subject to if such act had not passed. And the defendant further submitted by his answer, that under the stat. 2 & 3 *Ed. 6.* the rector of *High Ham* was entitled to the tithe of increase of cattle depastured in the said tract of pasture land prior to the passing of the first-mentioned act; and that the defendant denied the modus. Yet notwithstanding the matters alleged, the defendant had caused the plaintiff to be convicted of the premises, and the plaintiff had been condemned by the spiritual court in a large sum to be paid to the defendant in lieu of tithe, &c.; and the defendant still prosecutes his suit in the ecclesiastical court, &c. To this the defendant demurred generally, and the plaintiff joined in demurrer.

Dampier, in support of the demurrer, contended, 1st, that it was too late to call for a prohibition *after* sentence on the ground that the ecclesiastical court had tried the boundary of the parish, or the existence of a modus. For though these are questions properly triable by a jury, and the plaintiff might before sentence have come here and stopped the trial in the ecclesiastical court; yet as that court has *jurisdiction* of such questions incidentally, (for the question of parochial boundary may arise in every cause of substraction of tithe), and the objection goes only to the defect of *trial*, the plaintiff, after submitting to the trial there, and taking his chance of a decision in

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his favour, cannot object to it. *Full* v. *Hutchins* (*a*), *Argyle* v. *Hunt* (*b*), *Bannister* v. *Hunt* (*c*), *Blaquiere* v. *Hawkins* (*d*), *Symes* v. *Symes* (*e*), *Buggin* v. *Bennett* (*f*), *Offley* v. *Whitehall* (*g*), and 2 *Roll. Abr.* 209. *pl.* 2. All the cases shew, that where the ecclesiastical court has *original* jurisdiction of the cause (as here it must be admitted to have had), and nothing appears upon the face of the *libel* to oust it, prohibition does not lie after sentence merely for defect of trial. This distinguishes the present case from *Vanacre* v. *Spleen* (*h*), where the objection appeared on the face of the libel; as it also did in *Paxton* v. *Knight* (*i*), where the party had libelled upon a prescription over which the ecclesiastical court had no jurisdiction. The authority of that case, however, is opposed to the case in 1 *Ld. Ray.* 435. And in *Dutens* v. *Robson* (*k*), though the party libelled upon a modus, yet that being admitted, a prohibition was denied. And by *Argyle* v. *Hunt* (*l*), the party applying for a prohibition shall not, after sentence at least, allege matter dehors the libel to shew that the court below had not jurisdiction. But, secondly, supposing prohibition will in any case lie after sentence in a matter originally within the jurisdiction of the ecclesiastical court, the question will be, whether the construction of acts of parliament belong in all cases to the temporal courts exclusively; so that if the ecclesiastical or admiralty courts construe them otherwise than the temporal courts would have done, prohibition shall go even after sentence; or whether those courts have not jurisdiction to construe acts incidentally coming under their cognizance in matters

(*a*) *Cowp.* 422. (*b*) 1 *Stra.* 187. (*c*) 10 *Mod.* 12.
(*d*) *Dougl.* 378. octavo edit. (*e*) 2 *Burr.* 813.
(*f*) 4 *Burr.* 2035. (*g*) *Bunb.* 17. (*h*) *Carth.* 33.
(*i*) 1 *Burr.* 314. (*k*) 1 *H. Blac.* 100. (*l*) 1 *Stra.* 187.

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within their jurisdiction, whose decision thereon, however erroneous, can only be rectified on appeal. It may be admitted, that wherever the rule of the ecclesiastical law is directly different from that of the common law, and must necessarily lead to a different result, the latter is entitled to the preference; and prohibition may go even after sentence; as where the ecclesiastical court requires proof by two witnesses of matters proveable by one at common law: though prohibitions even in this case have been denied (*a*). Or where the question arises on the meaning of the words "*next of kin.*" 2 *Rol. Abr.* 303. *pl.* 28.: or on the extent of the word *month*, in matters not spiritual. In these cases the construction of the respective courts must necessarily be different. So prohibition will go at any time if an inferior court misconstrue an act regulating its own jurisdiction. 12 *Rep.* 42. And this was the ground of the doctrine laid down in *Brymer* v. *Atkins* (*b*). There the prize court had put a construction on the stat. 16 *Geo.* 3. *c.* 5. *s.* 14. which the court of *C. B.* considered that the prize court had authority to do, and did not prohibit it. And yet if the construction put by inferior courts on acts of parliament be not binding any further than as it coincides with the judgment of the courts at *Westminster*, it is in effect to deny their jurisdiction; for an erroneous judgment upon a matter within the jurisdiction of a court can only be rectified on appeal. But if the matter were coram non judice, the prize court could have had no authority to put any construction on the statute, and it must have been prohibited in the first instance. The spiritual court may have jurisdiction of matters coming incidentally in question there where it

(*a*) *Robert's* case, 2 *Cro.* 269. *Sid.* 161. 2 *Rol. Abr.* 299. *pl.* 10.
(*b*) 1 *H. Blac.* 164. 187, 8.

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would not have had original jurisdiction over such matters. *Reg.* 57. *b.* 58. So it may judge of a statute. 2 *Rol. Abr.* 307. *pl.* 16. *Pen*'s case, *M.* 8 *Jac. ib.* 308. *pl.* 22. *Lucy* v. *Lucy*, *H.* 14 *Car.* There a parson sued for tithes in the spiritual court against one who pleaded a lease for years made to him by the parson; to which the latter replied that he was in such a year absent from his benefice above 80 days, by which his lease became void. And held that no prohibition lay on this plea, although grounded on the stat. 13 *Eliz.*; and though it was objected that the judges of the spiritual court should not have the exposition of a statute. Dr. *Sutton*'s case (*a*), and *Scadding*'s case (*b*) are to the same effect. [Lord *Ellenborough* C. J. It will not, I apprehend, be contended that the ecclesiastical court has not jurisdiction to construe statutes incidentally coming in question before them; but only that if it construe them wrongly a prohibition shall go. The resolution of the Judges in the reign of *Jac.* 1. does not go further than this.] All the authorities have been lately considered in the cases of *Brymer* v. *Atkins*, and *Home* v. *Lord Camden* (*c*). What was said by Lord *Loughborough* in the latter, "that the exposition of the statute law appertains to the King's courts of record, and ought to be discussed and determined in those courts," must be understood with reference to what was said by his lordship in *Brymer* v. *Atkins* (*d*), where he states that the misconstruction by a prize court of an act of parliament by which its jurisdiction was regulated

(*a*) *Latch.* 228. *Cro. Car.* 65. (*b*) *Yelv.* 134.

(*c*) The first report of this case is in 1 *H. Blac.* 476., where the Court of *C. P.* gave judgment for the plaintiff in prohibition; the next, in 4 *Term Rep.* 382., where that decision was reversed by *B. R.*; and again in 2 *H. Blac.* 533., where the judgment of *B. R.* was affirmed in *Dom. Proc.*

(*d*) 1 *H. Blac.* 187, 8.

would

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would be a good ground of prohibition, on an ancient and essential maxim of the common law, "that all courts of special jurisdiction created by act of parliament must be limited in the exercise of that jurisdiction by such construction as the courts of common law may give to the statutes; because if they had a latitude to construe at their discretion the law by which they act, they would set themselves above the common law." In the case of *Home* v. *Lord Camden*, where the judgment of *B. R.* denying a prohibition to the prize court of appeals was ultimately sustained by the House of Lords, the reasons given by *Ashhurst* (*a*) and *Buller* Justices (*b*), and particularly by the latter, are decisive against the prohibition. The former said, "It is admitted that the courts of Admiralty have *exclusive* jurisdiction over all questions of prize; and *if so*, they must have the same jurisdiction over all matters that arise incidentally, *either in construing acts of parliament* or proclamations, in order to form their opinion on the principal question." *Buller* J. said, that "if it were competent to us to decide whether or not the court of appeals had misconstrued the act, I should desire further time to look into the authorities. But I think it is not now competent to the court to examine that question," &c. He afterwards states it "as a clear rule, that *after* sentence the courts of common law never grant a prohibition, unless the want of jurisdiction appear on the face of the libel:" for which he refers to *Full* v. *Hutchins* (*c*). Then after referring to the dictum in 2 *Rol. Abr.* 306. *pl.* 10. that if the ecclesiastical court *adjudge otherwise* (upon a condition in a lease) *than is warranted by the common law, a prohibition will be granted;* which he denies it to be law; he proceeds to touch upon the merits of the deci-

(*a*) 4 *Term Rep.* 395. (*b*) *Ib.* 396, 7. 400. (*c*) *Cowp.* 421.

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sion in the court below: and his opinion is the stronger; because he seems to have differed from the court of appeals in their construction of the act. The dictum in *Rolle* and some few ancient cases have certainly gone great lengths; but they are attributable to a jealousy of the ecclesiastical courts which at one time prevailed in the courts of common law, and justify the observation of Ld. C. J. *Vaughan* (a), "that this Court had in some of the cases bordered on things spiritual." And the inclination of Ld. C. J. *Eyre's* opinion to the same purpose may be collected from the manner of his stating the question in *Home* v. *Ld. Camden* (b). The strength of the argument on the other side rests on the inconvenience there pointed out by Ld. C. J. *Eyre*, namely, the possibility of two different rules prevailing on the same law, one in the courts of *Westminster*, the other in courts of peculiar jurisdiction, where the tribunals in the ultimate resort are not the same. But this inconvenience exists in other cases, and is not therefore a conclusive objection. As where the courts of equity and the spiritual courts have a concurrent jurisdiction in matters of tithe and matters of legacy. Or, as where the courts of Admiralty and of common law have concurrent jurisdiction in the case of mariners' wages, where the contract is made at sea and is not under seal, and in bonds of hypothecation which are under seal. So the plantation courts of Chancery in matters arising there, and the court of Chancery here, where the parties live in *England*, have concurrent jurisdiction (c), though the ultimate appeal from the one is to the King in council, and not to the House of Lords, as in the case of the other. The same took place formerly on contracts of marriage, before the jurisdiction of the spiritual court was taken

(a) 2 *Ventr.* 10. (b) 2 *H. Blac.* 535. (c) *Salk.* 404.

away

away by the stat. 26 *Geo.* 2. *c.* 33. *s.* 13.: and other instances are enumerated in *Bac. Abr. Prohibition*, L. 5. None of these concurrent jurisdictions could exist if the possibility of conflicting decisions were an objection. And such objection is also inconsistent with the law as now settled in *Full* v. *Hutchins* (*a*), that a party is too late who comes after sentence for a prohibition where the defect in the court christian is in the *trial* and not in the *jurisdiction*. So where two libels are exhibited against two inhabitants of a parish for tithe, and they set up a modus over the whole parish, if one submit to the trial in the court christian, and the other obtain a prohibition before trial and try at common law, the one case may be ultimately decided before the delegates, and the other by the House of Lords, who may decide differently. But this inconvenience cannot alter the law. [Lord *Ellenborough* C. J. and *Le Blanc* J. observed, that there the inconvenience would arise from the party's own fault, who did not apply in time for a prohibition.] In *Hill* v. *Good* (*b*) Lord C. J. *Vaughan* takes a distinction, which is confirmed in *Wenmouth* v. *Collins* (*c*) between statutes which give a new jurisdiction to the temporal courts, and those which are directory to the jurisdiction which before had cognizance of the subject. In the latter case the court will not prohibit the ecclesiastical court from proceeding, though the construction of the statute may come in question. Now here the acts in question do not alter the jurisdiction; they confirm to all the same rights they had before. The *Sedgemoor* act states the moor to be near the parishes, and makes the allotments parts of the parishes where the tenements in respect of which they were made are situated; and it saves the right of the King. The

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(*a*) Cowp. 422. (*b*) Vaugh. 304. (*c*) 2 Ld. Ray. 850.

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High Ham act makes the part thereby inclosed subject to the same charges it was before. The stat. 2 & 3 *Ed.* 6. *c.* 13. *s.* 3. makes the tithe of increase of cattle on any lands of which the parish is not known payable to the rector of the parish where the owner of the cattle resided. Neither of these statutes gives the temporal courts any new jurisdiction, nor alters or affects any jurisdiction which the ecclesiastical court had before; but the directions are general, and must be taken with reference to the court which had jurisdiction of the subject matter before. At any rate, however, before prohibition is granted it ought certainly to appear, which it does not, that the ecclesiastical court necessarily decided this case on the construction of the statutes: after sentence the plaintiff cannot complain of the defect of trial of the modus or boundary. The ground of its decision might be that *Sedgemoor* was not extraparochial, and in that case the King had no right. This would not be construing the act, but deciding on a fact. The sum given may have been for the tithes of increase of cattle under the stat. 2 & 3 *Ed.* 6. which creates such a charge, and the stat. 37 *Geo.* 3. which maintains it, even supposing the parish to which the moor appertains to be uncertain. It is not alleged by the ecclesiastical court that these lands were extraparochial before the act, and were only brought within the parish by its operation, in which case it might be said that the saving of the King's right (if it were not previously granted away) ought to operate.

Burrough contrà. The statute in question cannot be said to be directory to the ecclesiastical court, wherein no mention is made of that jurisdiction, but which merely contains general provisions, which must of course be taken to

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apply to the courts of common law. Neither can it be ſaid that the eccleſiaſtical court has not proceeded to adjudge tithe to the rector upon the conſtruction of the *Sedgemoor* act, as bringing the allotments within the pariſh; for the place, which was before alleged to be extraparochial, is denied to be ſo by the rector in his anſwer, *becauſe* the inhabitants of the pariſh of *High Ham* claimed rights of common on *King's Sedgemoor*, which was parcel of the ſeveral pariſhes adjoining, and that *the act* did not mention it to be extraparochial, and that the allotments *under the act* were made in reſpect of ſuch rights of common *appurtenant to the tenements in the pariſh*, &c.; and that the act of the 37 *Geo.* 3. ſubjected the allotments to the ſame *charges*, &c. as the tenements in reſpect of which they were made; evidently putting the whole caſe upon the acts as having virtually made thoſe allotments parts of the pariſh, and ſubject to the ſame burthens as the old incloſures. Now the only object of the *Sedgemoor* act was the diviſion of the moor between the lords of manors and the commoners claiming rights thereon before the ſtatute, and nothing is ſaid reſpecting the right to tithe, which is therefore left as it was before. No *parochial* rights were ever before exerciſed on the moor, nor does the act ſtate it to be within the boundaries of any pariſh, but *lying near* or *adjoining*; though by way of diſtinction the ſeveral parts are allotted to particular pariſhes. Then the clauſe in the *High Ham* act, 37 *Geo.* 3. directing the allotments to be ſubject to the ſame "*charges*" as the old tenements in reſpect of which they were made, merely relates to private charges, &c. on the eſtate, ſuch as dower, mortgages, &c. according to *Moncaſter* v. *Watſon* (*a*), and does not relate to tithe; the rectors of the

(*a*) 3 *Burr.* 1375.

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several parishes being no parties to the act, but merely the Lords and Commoners; and the accompanying words, such as uses, estates, trusts, &c. explain the meaning of the word *charges*. [*Lawrence* J. A similar clause in the case of the *Stonehouse Bridge* act lately (*a*) received the same construction.] Then the last clause but one saves to the lords of the manors all their privileges, except such for which compensation was made, and which were intended to be barred by the act, namely, common of pasture. And the last clause saves all the King's right and title with the same exception. Now if any person were before entitled to the tithe of the allotments which were extraparochial, it must have been the King. It is clear therefore that the ecclesiastical court in giving the rector the tithe of such allotments has misconstrued the acts, the interpretation of which belongs exclusively to the courts of *Westminster*, and therefore the misconstruction of them is a good ground of prohibition after sentence: the sentence itself is the gravamen; for till then it could not be known that the court below would misconstrue the acts. The current of authorities from the time of *James* the first to that of the doubt expressed by *Buller* J. in *Lord Camden* v. *Home*, in Error (*b*), (which doubt was not warranted by the authorities then mentioned, and upon further investi-

(*a*) *H.* 44 *Geo.* 3. *B. R.* That was a case sent up from the Court of Quarter Sessions in *Devonshire*, upon a question concerning the validity of a poor rate. The stat. 7 *Geo.* 3. for building *Stonehouse Bridge*, by *s.* 19. exempted it from "the land-tax or any other public or parochial rate or tax "whatsoever;" and by *s.* 20. provided that certain persons and their heirs should stand seised of the tolls of the bridge "to the same uses, trusts, and "estates, and subject to the same wills, settlements, limitations, remain-"ders, *charges*, tenures, rents, and incumbrances" as the ferry was in lieu of which the bridge was erected. And held that the word *charges* only extended to *private* charges on the estate.

(*b*) 4 *Term Rep.* 396, 7.

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gation would probably have been removed from the mind of the learned Judge), ſhews that where the eccleſiaſtical court acts contrary to the rules of the common law in any matter of common law cognizance, ſuch as the conſtruction of acts of parliament, the courts of *Weſtminſter* will prohibit it. This was the expreſs deciſion of the court in the caſe cited by the ſame Judge from 2 *Rol. Abr.* 306. *pl.* 10. and it is confirmed by other authorities. Where indeed the objection is only to the *trial*, it is the fault of the party if he do not apply before ſentence; and *non conſtat* but that the Court below may have decided wrong on the fact, and not on the law; but where the ſentence is the grievance, he can never come too late. The doctrine referred to as laid down by Lord *Loughborough* in *Home* v. *Lord Camden* (*a*), "that the expoſition of the ſtatute law appertains to the king's courts of record, and ought to be diſcuſſed and determined in thoſe courts," is not new, but is confirmed by the whole court in *Howe* v. *Nappier* (*b*). That was a ſuit in the Admiralty for ſeamen's wages, there being an agreement under ſeal; on which a prohibition went. Lord *Mansfield* there ſaid, "a prohibition is ex debito juſtitiæ if the Court of Admiralty proceed contrary to act of Parliament." The true queſtion in theſe caſes is, Whether the court below are proceeding againſt the common law? If the ſentence itſelf ſtated that the court had decided againſt a preſcription ſet up in a ſuit for ſubſtraction of tithe on the ground that it was not proved by more than one witneſs, this court would interfere by prohibition even after ſentence. In *Wheeler's* caſe (*c*), the eccleſiaſtical court had juriſdiction over the ſubject matter, namely, the working upon holidays, yet as it had miſconſtrued the ſtat. 5 *Ed.* 6. diſregarding the exception

(*a*) 1 *H. Blac.* 476. (*b*) 4 *Burr.* 1950. (*c*) *Godb.* 218.

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of works of neceſſity, ſuch as carrying hay, prohibition went. Admitting that the church had authority to appoint holidays, and to puniſh the breakers thereof; the court ſaid that the feaſt of St. John Baptiſt was a holiday *by act of Parliament; and therefore it did belong unto the judges of the law* whether the ſame were broken by doing ſuch work on that day. So where the Judge of the prerogative court had on granting adminiſtration to one *Slawney* (*a*), taken bond of him with the conditions uſual there, but beyond what was required by the ſtat. 21 *H.* 8. *c.* 5.; on prohibition prayed againſt proceedings there on that bond this court was clear that the prerogative court could not impoſe any other condition than the ſtatute required; "for they muſt take their bond according to the law; and when it is ſued the meaning and expoſition of the ſtatute, and of the condition of the obligation both are *to be judged by the courts of common law*. Again in Sir *W. Juxon* v. Lord *Byron* (*b*), where the eccleſiaſtical court had incidentally put a conſtruction upon a private act of Parliament, in which this court agreed and therefore denied a prohibition; Lord *Hale* and the whole court agreed, "that the ſpiritual court, though they may try matters cognizable at common law which fall in incidentally where the principal is eccleſiaſtical, yet they ſhall be prohibited if they proceed in the trial of ſuch incident temporal matter *otherwiſe than the common law would.*" In *Carter* v. *Crawley* (*c*) prohibition went becauſe the ſpiritual court had miſconſtrued the words of the ſtatute of diſtributions. And in *Berkeley* v. *Morrice* (*d*), where the Admiralty Court were prohibited for refuſing to receive a plea of the ſtatute of limitations,

(*a*) *Hob* 83. (*b*) 2 *Lev.* 64.
(*c*) *T. Ray.* 496. (*d*) 1 *Hardr.* 505

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in a suit for an account between the captain and owner of a merchant ship, this Court said, that it was a good cause of prohibition if they did receive the plea and did not give sentence thereupon *as the common law requires*. Prohibition also went in *Pierce* v. *Hopper* (*a*) upon the misconstruction of the pilot act, 3 *Geo.* 1. *c.* 13. There is no case over which the ecclesiastical court have clearer jurisdiction than in matters of probate; and yet where they had revoked a probate because the executor had become bankrupt, this Court in *Adriel Mill's* case (*b*) granted prohibition *after sentence and appeal.* So it was done in *Rebowe* v. *Bickerton* (*c*). In *Buggin* v. *Bennett* (*d*) prohibition was denied, not because it was applied for *after sentence* in the Admiralty, but because the suit being for seamen's wages, it did not expressly appear that the contract was by deed on land: but it was admitted that if that had been shewn prohibition would have gone even after sentence: and yet the objection would not have appeared on the face of the libel. The same observation will apply to other cases. In *Driver* v. *Colegate* there cited (*e*), the modus set up being admitted, and the spiritual jurisdiction continuing over the original cause of suit, there was no necessity for a prohibition: but no consent will give them jurisdiction where the law does not: and if the want of it appear in any of the proceedings, prohibition lies. The true rule is laid down in *Shotter* v. *Friend* (*f*), that where the spiritual court have cognizance of the principal, they shall have cognizance of the incidents and accessaries; but if the incident be a matter merely temporal, they must proceed there according to the course of the common law, and not secundum jus ecclesiasticum. And by the report in *Salkeld* it is not too late

(*a*) 1 *Stra.* 249. (*b*) *Skin.* 299. (*c*) *Bunb.* 81.
(*d*) 4 *Burr.* 2035. (*e*) *Ib.* 2040. (*f*) *Carth.* 142 and *Salk.* 547.

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late to come for a prohibition after sentence; *for the sentence in that case is the grievance.* And this agrees with *Forson* v. *Scott* (*a*). He also referred on this head to the answers of the Judges on the great controversy in 1604, 2 *Inst.* 613, 614. *answer to object.* 20.; to Lord C. J. *Vaughan*'s judgment in *Hill* v. *Good* (*b*); and to that of Lord C. J. *Eyre* in *Lord Camden* v. *Home*, (*c*) in *Dom. Proc.* Secondly, he contended that the ecclesiastical court had no jurisdiction to determine on the boundaries of parishes; that they had done so in this case, and therefore might be prohibited after sentence as well as before. For which he cited *Keilw.* 110. *b.* 13 *Rep.* 17. 2 *Inst.* 599. 1 *Bulstr.* 159. *Foster* v. *Hide*, 1 *Rol. Rep.* 332. 17 *Vin. Abr.* 581. *Prohibition*, L. 1. *Phillips* v. *Stacke*, *Noy*, 147. *Frezewell*'s case, 2 *Rol. Abr.* 319. *Hains* v. *Jescot*, *Comb.* 356. *Butler* v. *Yateman*, 1 *Sid.* 89. 5 *Bac. Abr. Prohibition*, 663. H. 18 *Vin. Abr.* 28., and 1 *Gibs. Codex*, *tit.* 9. *ch.* 13. *fo.* 239.

Dampier in reply said, that the last objection as to the question of boundary went to the defect of *trial* only, and not of *jurisdiction*; and therefore unless that distinction were wholly done away, which was recognized in several of the later cases, the objection ought to have been made before sentence; and if the trial in the ecclesiastical court were submitted to, it was no ground for prohibition. In *Frezewell*'s case, 2 *Rol. Abr.* 319. *pl.* 2. which is the strongest authority the other way, being *after* trial, non constat but that the defect of jurisdiction might have appeared on the face of the libel: and it is, besides, suggested that the king's right came in question, where the

(*a*) *Sayer*, 176.
(*b*) *Vaugh.* 304. and vi. *Harrison* v. *Burwell*, *ib.* 220. and 2 *Ventr.* 15—20.
(*c*) 2 *H. Blac.* 533.

maxim

maxim of nullum tempus occurrit regi would apply. And it alſo ſeems to have been queſtioned by Lord *Holt*, in *Hains* v. *Jeſcot* (*a*). As to the principal ground of objection, the ſuppoſed miſconſtruction of the acts of parliament, he admitted that there was a contrarity of authorities, but contended that in principle the miſconſtruction of an act, reſpecting a ſubject matter over which the eccleſiaſtical court had either an immediate or incidental juriſdiction, was only ground of appeal, and not of prohibition, according to the opinion of *Aſhhurſt* and *Buller* Juſtices, in Lord *Camden* v. *Home*, where the former deciſions were reviewed. That the authorities to the contrary were chiefly dicta, or elſe were caſes where the objection after ſentence appeared either on the face of the libel, or aroſe on the conſtruction of acts of parliament giving limited juriſdiction to the courts below, within which they were to be reſtrained; or where the different rules of the temporal and ſpiritual courts touching the ſubject matter neceſſarily led to a different reſult. But here it did not even diſtinctly appear that the eccleſiaſtical court had founded its ſentence on the conſtruction of the acts of parliament, much leſs that any difference of the law of that court, as applied to the ſubject matter, muſt neceſſarily have led to a different conſtruction than what would have prevailed in the temporal courts.

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Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered judgment.

This comes before the Court on a demurrer to a declaration in prohibition. The plaintiff applied to this Court for a prohibition to prohibit the conſiſtorial court of the archdeacon of *Wells* from further proceeding in a ſuit there in-

(*a*) *Comb.* 356.

ſtituted

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ſtituted by the defendant *Gapper* againſt him for tithes of land in *High Ham*; and he grounded his claim to the writ of prohibition on this, that the eccleſiaſtical court had decided in favour of the rector's claim to tithe, by conſtruing the acts made for dividing, allotting, and incloſing *Sedgemoor*, as making a part of that moor, to be within the pariſh of *High Ham*, which before was extraparochial, and that in ſo doing the eccleſiaſtical court had miſconſtrued the acts of parliament. On ſhewing cauſe againſt the rule for a prohibition in *Eaſter Term* 1803, it appeared to the Court a proper ſubject for a further and more ſolemn diſcuſſion, and the parties were therefore directed to declare in prohibition.

The objections to granting a prohibition in this caſe are, 1ſt, That it is too late after ſentence. 2. That miſconſtruction of a ſtatute is matter of appeal, and not of prohibition. In ſupport of the firſt objection it is ſaid, that if the defect of the original juriſdiction do not appear on the face of the libel, but the objection to the proceeding of the eccleſiaſtical court ariſes out of ſome matter incidentally occurring, it comes too late after ſentence. And further, that in this caſe it does not appear neceſſarily that the eccleſiaſtical court decided on the conſtruction of the incloſure acts, but might have proceeded on other grounds to try the boundaries of the pariſh: and that after the party's ſubmiſſion to have that queſtion tried by the ſpiritual court, he ſhall not, when it has been decided againſt him, apply for a prohibition. And in ſupport of theſe poſitions, 2 *Roll. Abr.* 290. *pl.* 2. *Offley* v. *Whitehall*, *Bunb.* 17. *Argyle* v. *Hunt*, 1 *Str.* 187., the caſe of *Market Boſworth*, in 1 Ld. *Raym.* 435, and *Full* v. *Hutchins*, *Cowp.* 422. were relied on. But as to

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this firſt objection, we cannot ſuppoſe that the eccleſiaſtical court proceeded on any other grounds than the conſtruction of the incloſure acts; becauſe, in anſwer to the plea of the plaintiff, in prohibition, that the place, in reſpect of which the tithe was claimed, was "extra parochial," the defendant has no otherwiſe denied that allegation, than by argumentatively contending that becauſe the owners of the lands in the ſeveral pariſhes adjoining *Sedgemoor* were in reſpect thereof entitled to common of paſture on that moor, therefore *Sedgemoor* was part of ſuch ſeveral adjoining pariſhes, (although the boundaries of each pariſh were not certainly known); and alſo by ſtating the ſtat. 31 *Geo.* 3., which is the act for draining and dividing the moor; the allotment of the commiſſioners; and the ſtat. 37 *Geo.* 3. which is an act for dividing and allotting, *inter alia*, ſo much of *Sedgemoor* as had been allotted to the pariſh of *High Ham* in reſpect of rights of common claimed by the owners of land in that pariſh. So that it is certain that the eccleſiaſtical court had no ground whatever ſubmitted to them whereupon to exerciſe their judgment, or from which they could conclude that the places in reſpect whereof the tithe is claimed were certain and defined parts of the pariſh of *High Ham* but theſe two acts of parliament, and the conſtruction and effect belonging to the ſame. The authorities cited certainly do not eſtabliſh, that in no caſe a prohibition ſhall be granted after ſentence, unleſs a want of juriſdiction appear on the face of the libel; for in the caſe of *Full* v. *Hutchins*, which was moſt relied on, a diſtinction which applies expreſsly to this caſe is taken between *prohibitions granted for the ſake of trial*, which are not granted after ſentence, and prohibitions, which not being granted before ſentence to ſtay trial, becauſe matters

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ters triable at the common law have incidentally arisen, will, neverthelefs, be granted if the ecclefiaftical court proceed to try fuch matters contrary to the principles and courfe of the common law: and, as an inftance of the Court's fo prohibiting, Ld. *Mansfield* mentions *the conftruction of an act of parliament.* In fuch cafes no prohibition can go before fentence; for till fentence be given the courts of common law have no reafon to fuppofe that the ecclefiaftical court will determine wrong; which, however, if it fhould do, it is not too late to come then, that is, *after* fentence, for a prohibition; for *the fentence* is in fuch cafe the *gravamen*; and fo it was exprefsly ftated to be by *Holt*, C. J. and the Court in *Shotter* v. *Friend*, *Salk.* 547.

This brings us to the next point, Whether the ftatutes of the 31 & 37 *Geo.* 3. have been, in the prefent inftance, mifconftrued? and if mifconftrued, then that queftion which is the fubject of the fecond objection arifes, namely, Whether fuch mifconftruction be a ground for *prohibition*, or merely of *appeal?* As to the actual mifconftruction of thefe ftatutes, it will not be neceffary to fay any thing; for the counfel for the defendant has not even argued that the effect of them was to make the allotments part of the parifh of *High Ham*.

The laft queftion, therefore, which is certainly a confiderable one, alone remains to be difcuffed. If this were a queftion which came now for the firft time to be confidered, we might incline perhaps to think it fhould be deemed matter of *appeal* rather than of *prohibition*, according to the opinion of Mr. J. *Buller* in *Home* v. *Ld. Camden*, 4 *Term Rep.* 397, where he fays, "if the court

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court below have jurifdiction over the fubject, though they miftake in their judgment, it is no ground for prohibition, but only matter of appeal." But, confidering the current of authorities from the earlieft times down to the period when that cafe came before the Court (the authority of which, as to that point, received, it will be recollected, no confirmation in the Houfe of Lords; the point itfelf not being neceffary to be decided in order to the determination of the cafe then in judgment): and remembering alfo, that in that very cafe, (reported in 1 *H. Blac.* 515.,) as alfo in *Brymer* v. *Atkyns*, 1 *H. Bl.* 164. & 188., Lord *Loughborough* and the other Jugdes of the Court of C. B. clearly confidered the mifconftruction of an act of parliament as ground of prohibition: adverting, I fay, to thefe authorities and circumftances, we cannot feel ourfelves warranted in holding, that the grounds of granting prohibitions are fo narrow and limited as to be confined folely to cafes of excefs of jurifdiction. Mr. J. *Blackftone*, in the third volume of his *Commentaries*, *c.* 7., fpeaking of the writ of prohibition, fays, that "it may be directed to the courts chriftian, "the univerfity court, &c. where they concern them- "felves with any matter not within their jurifdiction: "*or if, in handling matters clearly within their cognizance*, "they tranfgrefs the bounds prefcribed to them by the "laws of *England*; as where they require two witneffes "to prove the payment of a legacy; in fuch cafes alfo a "prohibition will be awarded. For as the act of figning a "releafe or actual payment is not properly a fpiritual "queftion, but only allowed to be decided in thofe "courts, becaufe incident or acceffary to fome original "queftion, clearly within their jurifdiction, it ought "therefore, when the two laws differ, to be decided, not

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" according to the ſpritual, but the temporal law; elſe " the ſame queſtion might be determined different ways, " according to the court in which the ſuit is depending; " *an impropriety which no wiſe government can or ought to* " *endure; and which is therefore a ground for prohibition.*" This opinion of Sir *William Blackſtone* ſeems to be the fair reſult drawn from a great variety of caſes in which prohibitions have been granted, and where the eccleſiaſtical court had moſt undoubtedly cognizance, but had determined matters of the common law, incidentally ariſing, in a manner different from that in which the courts of common law would have decided the ſame points. And that ſuch are proper grounds of prohibition has been alſo allowed by the moſt conſiderable Judges who have at different periods ſat in *Weſtminſter Hall*. It will be ſufficient ſhortly to mention ſome of them. In 2 *Roll. Abr.* 301. *pl.* 11. it is ſtated that if a woman, after a divorce a menſa et thoro, ſue in the eccleſiaſtical court for a legacy given to her, and the releaſe of the Baron be pleaded and diſallowed, a prohibition ſhall be granted. In *Baſtard* v. *Studley*, 2 *Lev.* 209., a legacy was left to *A.* and *B.*; *A.* died, and the executor of *A.* ſued in the ſpiritual court for *A*'s ſhare; there being no ſurvivorſhip in ſuch caſe by the law eccleſiaſtical; whereupon *B.* ſued a prohibition: and, upon argument, it was adjudged that the prohibition ſhould ſtand. And Lord Chief Baron *Comyns* in his *Digeſt*, tit. *Prohibition*, *G.* 23. introduces this caſe, by ſtating as a rule of law the concluſion which reſults from it, viz. that *prohibition ſhall go*, " *if a ſuit in the ſpiritual court be determined contrary to the right at common law.*" In 1 *Roll. Rep.* 12. in a ſuit for tithe, an award was pleaded, and prohibition moved for, as this was a matter triable at law; but denied. And the Court ſaid,

if

if the ſpiritual court have cognizance of the principal, they ſhall have it of the incident, though triable at common law. But Lord *Coke* added, *if the ſpiritual court ſhould decide otherwiſe on ſuch award than it ought by common law*, that then a prohibition ſhould be granted; which was allowed by *Doddridge*. In Sir *William Juxon* v. Lord *Byron*, 2 *Lev.* 64., in a ſuit for tithes by mortgagor in poſſeſſion, the mortgagee came in *pro intereſſe ſuo*, and the eccleſiaſtical court decided againſt him; and prohibition was denied, becauſe they had done right. But *Hale* and the whole Court agreed, "that though the "ſpiritual court *may* try matters cognizable at the common law which fall in incidentally, where the principal is eccleſiaſtical; yet they ſhall be prohibited if "they proceed in the trial of ſuch incident temporal "matter otherwiſe than the common law would." The authority of this caſe is recognized by Lord *Mansfield* in *Full* v. *Hutchins*. And in *Shotter* v. *Friend*, *Carth.* 142. where payment of a legacy was offered to be proved by *one* witneſs and diſallowed; after ſentence, prohibition was awarded on this ground, that where the ſpiritual court determine any incident temporal matter, they muſt do it according to the courſe of the common law; and if they do not, a prohibition will go: as if they require the revocation of a nuncupative will to be proved by *two* witneſſes; or hold that tithes are not well ſet out without notice to the parſon. All theſe, it is to be obſerved, are caſes of things within the juriſdiction of the ſpiritual court, and might be the ſubject of appeal. And authorities may be found equally ſtrong as to the courts of *Weſtminſter Hall* interfering by prohibition where ſtatutes have been expounded otherwiſe than the courts of common law would expound them. As to which I will firſt refer

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to the answers of all the Judges to the complaint exhibited by Archbishop *Bancroft* in the reign of *Jac.* 1., one of which was, "that the Judges, under colour of authority to interpret statutes, in favour of their prohibitions, made causes ecclesiastical to be of temporal cognizance." To which the answer was; "As for the Judges expounding "of statutes that concern the ecclesiastical government "or proceedings, it belongeth to the temporal Judges." 2 *Inst.* 614. *Wheeler*'s case, in *Godbold*, 218, was a question on a statute within the jurisdiction of the ecclesiastical court; for the offence was by the stat. 5 *E.* 6. *c.* 3. *f.* 3. punishable in that court, and the truth and validity of the defence was a matter for them to determine, (sc.), whether the carrying the hay was a work of necessity within the meaning of the 6th section of that act of Parliament; and if that Court decided improperly thereupon it was fit matter for an appeal: yet a prohibition was granted, "because it was for the Judges to say whether a holiday created by act of Parliament were broken or not. Upon this case Mr. Justice *Buller*, in *Home* v. Lord *Camden*, has observed, that the Judges must have considered this as a case without the jurisdiction of the ecclesiastical court, as being excepted out of the act of Parliament. But it seems rather that the ground of the determination was, that the ecclesiastical court held that to be a breach of the statute, which the courts of common law would not have holden to be a breach: and as the offence was created by the statute, they would prohibit in case it were misconstrued. Not that the spiritual court had not jurisdiction to construe it, but that the mischiefs of misconstruction were to be prevented by prohibition. In 2 *Roll. Abr.* 303. *pl.* 27. prohibition was granted to the delegates, to prevent their granting

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granting administration to one nearer of blood by their law, but not so near by ours: and this reason was assigned for it; because this being ordained by statute ought to be interpreted according to our law; and, as the book says, prohibition was granted *to try the law*. Upon which Mr. Justice *Buller* has observed, that no prohibition can be granted for the purpose of *trying the law*: but this observation seems well answered at the bar; for the book can only be understood to mean and refer to that trial of the law which constantly takes place when the plaintiff is directed to declare in prohibition, in order that the law upon the matter in dispute may be thoroughly discussed and settled. This case was in *Mich.* term, 21 *Jac.* 1.; and a similar point was determined in another case, *Hil.* 22 *Jac.* 1. *ibid. pl.* 28. In the same book also, fol. 302. pl. 19. it appears that prohibition was granted to the spriritual court in a proceeding on the stat. 2 *E.* 6. *c.* 13. *s.* 2. for not setting out tithes; because that Court held it not a sufficient setting out, the parson not being present; it being sufficient by our law, although the parson be absent: which case was relied on in that of *Shotter* v. *Freind*, already mentioned. In *Berkley* v. *Morris*, *Hardress*, 502. in a proceeding in the Admiralty for an account of a merchant ship taken as prize, a plea of the statute of limitations was refused; and the Court of Exchequer, *Hale* being the Chief Baron, held that the plea ought to have been received; for that the statute was pleadable in the Admiralty; and if it were not received, that the rejecting it was a good cause of prohibition; *and likewise if they received it, and did not give sentence thereupon as the common law requires.* In *Carter* v. *Crawley*, *Sir T. Ray.* 496. the question was, if the representatives of a deceased aunt of an intestate were entitled

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to a ſhare of his perſonal eſtate under the ſtatute of diſtributions, jointly with a living aunt of the inteſtate? And there (p. 497.) Lord *North* ſaid, "whatever is determined at common law to be the true meaning of that act muſt be a rule to the eccleſiaſtical courts; for the courts of common law are entruſted with the expoſition of acts of parliament, and we ought not to ſuffer them to proceed in any other manner than ſhall be adjudged by the King's courts to be the true meaning of the act." And though there were, according to *Freeman's Report*, 297. a difference of opinion, yet that was as to the conſtruction of the ſtatute of diſtributions, and not as to the abovementioned poſition of Lord *North*, for the purpoſe of which this caſe is now cited. And in the caſe of *Pearſe* v. *Hubbard*, *Strange*, 249. it was a matter for the Admiralty Court of *Cinque Ports* to determine, whether the party under the true conſtruction of the act of parliament, 3 *Geo.* 1. were liable to the penalty for navigating a ſhip, not being a member of the *Trinity Houſe*: it was the proper forum ſpecially appointed by the ſtatute to try and decide on the offence, if the offender were found within the juriſdiction of the ſame; and if they gave an erroneous judgment, it might be corrected on appeal: yet the Court interpoſed by prohibition: and Lord C. J. *Pratt* there conſiders not only a want of juriſdiction as a ground of prohibition, but alſo the circumſtance of a Court proceeding by the rules of the civil law deciding otherwiſe than the courts of common law would upon the ſame ſubject. For he ſays, "admitting the caſe to be within the intent of the act, "yet ſurely in the caſe of a freehold we ought to be ſa-"tisfied of that removal, i. e. of the juſtice of that re-"moval, by their ſhewing a power to make by-laws "and every other ſtep neceſſary to make a lawful re-

 moval;

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" moval; and for want of *this* as well as for want of " *juriſdiction*, I think no conſultation ſhould go." The ſubject matter of all theſe caſes, both as they involved the determination of queſtions of a temporal nature, and the conſtruction of ſtatutes, was clearly within the juriſdiction of the ſeveral courts prohibited. They are caſes in which the judgment given below might have been corrected on appeal: and ſome of them are caſes where the common law courts have taken upon themſelves the conſtruction of acts of parliament made reſpecting ſubjects peculiarly relating to the inferior courts ſo prohibited, and have yet even in ſuch caſes granted prohibitions when ſuch inferior courts miſconſtrued thoſe acts of parliament. And the diſtinctions attempted in the argument for the defendant fail in ſhewing that the queſtion now under conſideration does not fall within the authority of thoſe determinations in which prohibitions have been granted; for the caſes cited ſhew that prohibitions have been granted in queſtions within the juriſdiction of ſuch inferior courts, not merely where the rules of the two juriſdictions neceſſarily claſh with each other, or in caſes of conſtruction of *ſtatutes* regulating their juriſdictions; but that the courts of common law have *in all caſes*, in which matter of a temporal nature has incidentally ariſen, granted prohibitions to courts acting by the rules of the civil law, where ſuch courts have decided on ſuch temporal matters in a manner different from that in which the courts of common law would decide upon the ſame: and that this has been the doctrine of the Judges, not only in the time of Lord *Coke*, when a conſiderable degree of jealouſy ſubſiſted between the courts of *Weſtminſter-hall* and thoſe of eccleſiaſtical juriſdiction, but in the times of Lord *Hale*, Lord *Holt*, Lord C. J. *Pratt*, and as lately as in the time of Lord

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Mansfield, who in the case of *Full* v. *Hutchins* particularly instanced the misconstruction of an act of parliament as a ground for prohibition, even *after* sentence; the reasons of which are so strongly marked by Sir *Wm. Blackstone* in the passage already cited from his Commentaries. And to use by adaptation to this subject a part of the words of Lord C. J. *Vaughan*, in *Hill* v. *Good*, *p.* 304., and whose authority has been quoted to shew that the common law has encroached on matters spiritual, it may be said, "though if the granting prohibitions to the spiritual "courts were *res integra* now, we might not see reason to "grant them in any case, the matter being wholly of ec- "clesiastical conuzance;" yet as "many prohibitions "have been granted to the spiritual courts in cases upon "the construction of different statutes, and after so many "parliaments wherein no complaint has been made, or "certainly no redress given, it cannot be expected we "should against so many judicial precedents take upon "us to alter the law so long practised." For these reasons we are of opinion that the prohibition should stand.

Friday, June 15th.

The KING *against* CORRY.

The voluntary absence of a chief officer of a corporation upon the charter-day of election of his successor is not indictable upon the stat. 11 *G.* 1. *c.* 4 *f* 6. unless his presence as such chief officer be *necessary* by the constitution of the corporation to constitute a legal corporate assembly for such purpose.

THIS indictment framed on the stat. 11 *Geo.* 1. *c.* 4. *f.* 6. against the defendant, as bailiff of the borough of *Ivelchester*, for absenting himself from a corporate meeting for the election of a new bailiff for that borough, stated that *Ivelchester* in the county of *Somerset* is an ancient borough, and incorporated by charter of the 3d and 4th of *Philip* and *Mary*, by the name of the bailiff and

burgesses

burgeſſes of the borough of *Ivelcheſter*, which directs that there ſhould be one bailiff to be choſen of the burgeſſes in form thereinafter ſpecified. That the charter named *John Philips Burgeſs*, an inhabitant of the borough, to be the firſt bailiff, to continue in office till the feaſt of *St. Michael the Archangel*, and until another inhabitant or burgeſs ſhould be made ruler and ſworn to that office according to the ordinances, &c. after ſpecified. And granted further, that there ſhould be twelve burgeſſes to be called the chief burgeſſes and counſellors of the ſame town for all matters touching the government of the ſame: and that they the chief twelve burgeſſes ſhould be from time to time aiding and aſſiſting the bailiff for the time being in all matters touching the ſaid borough. *That the ſaid capital burgeſſes and counſellors* of the borough *for the time being, or the greater part of them*, from time to time ſhould have power *yearly and every year* in *September*, viz. on the *Monday* next before the *feaſt of* St. Michael the Archangel, *to chuſe and nominate one of themſelves who ſhould be bailiff of the borough* for one whole year then next enſuing; and that he after his election and before his admiſſion ſhould take the oath of office on the *Monday* then next following his election as aforeſaid, *before the bailiff being his laſt predeceſſor, if he ſhould be alive and preſent*, in the preſence of the other chief burgeſſes for the time being; and *if the ſaid bailiff his predeceſſor ſhould be then dead or abſent*, then before the chief burgeſſes for the time being, or the greater part of them. The indictment then ſtated, that the defendant, late of the pariſh of *Ivelcheſter* in the borough of *Ivelcheſter* aforeſaid, in ſaid county of *Somerſet*, on the 25th of *September*, the 43 *Geo.* 3. was and from thence until and upon the *Monday* next before the feaſt of *St. Michael the Archangel*,

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in the 43d year aforesaid, and afterwards *was bailiff of the said borough*; and that on *Monday* next before the feast of *St. Michael the Archangel*, in the 43d year aforesaid, certain of the then capital burgesses of the borough assembled together at the *Guildhall* of and within the said borough, the same being the usual and proper place for that purpose, *in order to chuse one of themselves to be bailiff* for the ensuing year; and *it was then and there the duty of the defendant as such bailiff as aforesaid to attend and be present at such election*; nevertheless the defendant not regarding his duty in that behalf, nor the statute, &c. upon the said *Monday* next before the feast of *St. Michael the Archangel*, in the 43d year aforesaid, the same so being the charter-day for such election as aforesaid, *unlawfully and voluntarily did absent himself from the said assembly so holden for the purpose of such election of a bailiff of the borough, and from such or any other election of the said officer*, contrary to the form of the statute, &c. in contempt, &c.

After verdict it was moved in arrest of judgment, 1st, that the stat. 11 *Geo.* 1. *c.* 4. on which the indictment was framed extends only to such chief officers of boroughs whose presence is necessary to an election, and that it does not appear from the constitution of this borough, as set forth in the indictment, that the presence of the defendant as bailiff and chief officer of the corporation was necessary to the holding of a corporate assembly for the election of his successor. 2dly, That there is no venue laid to the offence charged.

Gibbs, *Lens* Serjt., *Dampier*, and *Pell*, shewed cause against the rule. 1st, The law creates a duty in all the members of a corporation to attend corporate meetings, and

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and more particularly in the chief officer, whose duty it is to preside. And therefore it was said in *Reg. v. the Bailiffs of Ipswich* (a), that nothing could be done at a corporate assembly without the presence of the bailiffs, being the heads of the corporation; and that, though no special provision were made for it in that charter; for that the quorum clause was no more than the law would imply (b). Then the statute 11 *G.* 2. is only confirmatory of the general law, and assumes, rather than creates the necessity of the chief officer's attendance, though only for the purpose of presiding at a corporate meeting for the election of his successor; for without him the corporation cannot be said to be complete, and consequently no corporate act can be done. With this view the 6th clause is framed in the disjunctive, "that if any mayor, "bailiff, or other chief officer shall *voluntarily absent* him-"self, *or* knowingly and designedly prevent or hinder the "election of any other chief officer, &c. he shall suffer "six months' imprisonment," &c. The object of the statute was to insure the annual election of the chief officer of every corporation, which it was in the power of the then chief officer to frustrate or delay, either by wholly absenting himself on the charter or prescriptive day of election, by which no corporate assembly could be holden; or if present in the first instance, by irregular conduct in the mode of election, or by dissolving the assembly before the business was concluded. Therefore his voluntary absence was made a substantive offence as well as his designedly hindering the election, which latter might be committed by him when present: and the former may be committed, though he were not included in

(a) 2 *Ld. Ray.* 1237. (b) Sed vide 3 *Mod.* 13.

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the quorum clause of election. The provision in the charter for the new bailiff's taking the oath of office before the chief burgesses in the absence of the last bailiff was not intended to dispense with his attendance, but to provide a substitute for it, and render the election valid, notwithstanding such his absence, which would otherwise have been invalid. The swearing in is also on a day subsequent to the election, and therefore no inference can be drawn from that provision to shew that his presence might be dispensed with at the election. And though the election clause does not mention the bailiff by name; yet being always a *capital burgess*, he was considered as sufficiently designated under that general description, in which character he would have voted. But the necessity of his attendance as chief officer is for the purpose of *presiding*, which duty in his absence must be performed by another. And here it being expressly alleged that it was his duty to have attended, if it were not so, he ought to have shewn it at the trial as matter of defence. *Dormer's* case, 2 *Leon.* 5. 2dly, As to the want of venue, absence is a negative act, and therefore needs no venue; as in an indictment on the stat. 1 *Eliz.* *c.* 2. for absenting from church. 1 *Hawk.* *c.* 10. *s.* 5. But if a venue were necessary in this case, it is sufficiently laid; for the place is mentioned where the election ought to have been made, namely, "*at the* Guildhall *of and within the said borough*;" and it is alleged that it was then and *there* the defendant's duty to have attended and been present, and that he absented himself therefrom.

Burrough in support of the rule. 1st, The corporation is alleged to consist of a bailiff and twelve capital burgesses, which latter are to be *aiding and assisting* to the bailiff.

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bailiff. Therefore where the charter afterwards directs the election of the bailiff to be made by "the said capital burgesses *and counsellors*," that must mean exclusive of the bailiff for the time being; though if it were otherwise, his interference in the election would only be in his character of capital burgess, and not as bailiff, and so not within the statute. The object of the statute was not to enforce the attendance of chief officers of corporations where it was not before required, and where it would be nugatory, but as the act itself expresses it, "to prevent the inconveniences arising from want of such elections being made upon the days appointed;" which inconveniences arose "by *the contrivance or default of the person who ought to hold the court or preside* in the assembly where such elections were to be made:" for remedy whereof it enacts, "that if in any borough, &c. no election shall be made of the chief officer upon the day appointed by charter or usage, or such election being made shall afterwards become void, whether such omission or avoidance shall happen *through the default of the officer who ought to hold the court or preside, &c.* or by any accident, the corporation shall not be dissolved or disabled from electing such officer for the future." And then it goes on to provide that on a future day "*the members or persons having right to vote at or to do any other act necessary to be done in order to such election*" shall forthwith proceed to the election. The whole purview of the act shews that the 6th clause which punishes the chief officer voluntarily absenting himself, or designedly hindering the election on the charter or usage day, was only intended to apply to such chief officers whose absence or hindrance could frustrate the election, to whom only the mischief to be remedied and the nature of the remedy could

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apply. And it was neceſſary that the clauſe ſhould be framed in the disjunctive, becauſe the miſchief might ariſe as well from the abſence of ſuch an officer as from his miſconduct when preſent. Then the allegation that it was the defendant's duty *as bailiff* to attend the election is a mere inference of law not warranted by the premiſes. 2dly, As to the want of venue; this is not ſuch a negative act to which no certain place can be aſſigned; for the defendant's attendance, if neceſſary, was a local duty, and his abſence from the proper place in order to bring him within the words of the act, muſt have been *voluntary*, and is ſo alleged to have been. The offence then was not only capable of having a venue aſſigned, but could not properly be deſcribed without one. Then it is not ſufficient that a place be named in an indictment unleſs it be named by way of venue; whereas the only mention of the borough of *Ivelcheſter* is either as an addition to the defendant or as deſcriptive of the place where the *Guildhall* was, which in itſelf is no venue.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. delivered judgment.

This is an indictment againſt the defendant as bailiff of *Ivelcheſter*, charging him with having, in breach of his duty, *unlawfully and voluntarily abſented himſelf* from an aſſembly or meeting of the twelve capital burgeſſes of that borough, holden on *Monday* next before the feaſt of *St. Michael* laſt paſt at the *Guildhall* of and within that borough, purſuant to the charter of *Philip* and *Mary*, for the election of a bailiff on that day, *againſt the form of the ſtatute*, *i. e.* of the 11 *G.* 1. *c.* 4. *ſ.* 6. Upon a motion in arreſt of judgment two objections have been taken to the

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the indictment; 1st, That it does not appear to have been *the necessary duty of the defendant* (who is admitted to have been in virtue of his office of bailiff, *chief officer* of the borough), to have been *present at the meeting of the capital burgesses* holden *for the election of his successor.* 2dly, That there is no *venue* laid in the indictment, from which a jury may come for the trial of the several facts alleged in the indictment, and upon which issue is joined upon the plea of not guilty. As to the first of these objections; it does not appear *by the charter* stated to have been the duty of the defendant, *as bailiff*, to be present at the election of his successor. It is an election which the charter only requires to be made by the *capital burgesses*, who are twelve in number, or the greater part of them, without making any mention whatever of *the bailiff* with a reference to that election. And though the bailiff when elected be directed to be sworn upon the *Monday* following before *his predecessor*, "if *he should be alive* and *present*," yet so little is the presence of the bailiff essentially necessary even on that occasion, that the charter directs that "if the bailiff the predecessor *should be then dead or absent*," the new bailiff should be sworn in "*before the chief burgesses of the borough for the time being or the major part of them.*" The presence of the *bailiff*, *as such*, not being (as it clearly is not) required by the letter of the charter, it remains to be considered whether it be required either by the common law, or by the stat. of the 11 *G.* 1. *c.* 4. That it is required by the general rule of the common law, independent of any charter of the particular borough, was contended on the part of the prosecutor on the authority of the *Queen against the Bailiffs of Ipswich, 2d Lord Raymond* 1237; where it is laid down by the Court, "that as in all *corporate acts* the act of the majority

11 *Geo.* 1. *c.* 4.

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"majority is the act of the whole, so the *bailiffs being the* "*head of the corporation*, nothing can be done *without* "*their presence*; and this is so though no special pro-"vision be made for it by the charter:" But this must be understood of general corporate acts required to be done by the *whole* body corporately assembled, and which of course are not well done, if the chief officer, being an integral part of such body, be wanting. But this rule does not apply to cases where acts are required or authorized to be done, as here, by any one integral member or branch of the corporation, acting separately and apart from the rest. Is it then (which is the only remaining question upon this first head of objection) required by the stat. 11 *G.* 1. *c.* 4.? By adverting to the preamble it appears that the *mischief meant to be obviated* was the mischief arising from the not doing acts required by charter or usage to be done at *certain times in order to or for the completing of the election of mayor, bailiffs, or other chief officers*. And by the 6th section of the act it is for that purpose enacted, "that if any mayor, bailiff, or "bailiffs, or other chief officer or officers of any city, "borough, or town corporate shall *voluntarily absent him-*"*self or themselves from, or knowingly and designedly prevent* "*or hinder the election of any other mayor, bailiff, or other* "*chief officer* of the same city, borough, or town cor-"porate, upon the day or within the time appointed by "charter or ancient usage for such election," the person so offending is, upon conviction, to suffer *six months' imprisonment*, and to be disabled from *holding any office* belonging to that corporation. The *voluntary absence* from *the election of a chief officer*, which is thus severely punished by six months' imprisonment and the corporate incapacity above stated, must, in fair construction of the

statute,

ſtatute, be ſuch an abſence whereby the miſchief complained of in the preamble, viz. "of preventing the completion of the election of a chief officer," and for the remedy and prevention whereof the act is profeſſedly made, may poſſibly be occaſioned. It muſt be abſence, at leaſt, where preſence was antecedently a duty: But that cannot be predicated of the abſence on this occaſion, with a reference to any of the duties of the *bailiff, as ſuch,* which are either enjoined by this charter, or to be collected from any principles of the common law. Unleſs therefore this 6th ſection can be conſidered as of itſelf creating a ſubſtantive neceſſity in all caſes for the preſence of the chief officer of the corporation, *as ſuch,* at the election of his ſucceſſor, where his preſence was not required before the ſtatute (which appears to us a propoſition not capable of being maintained); the *voluntary abſence* charged in this indictment of a chief officer who had no occaſion, *as ſuch,* to be preſent, and whoſe abſence had no effect whatſoever towards preventing or hindering the election of his ſucceſſor, is not that *voluntary abſence* of a *chief officer* which this act meant to remedy or prevent by the penal proviſions of the 6th ſection. As the indictment appears to us therefore to be bad upon this firſt ground of objection, it renders it unneceſſary to enter into the validity of the ſecond objection, on the ground of which the judgment is ſought to be arreſted.

Judgment arreſted.

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Saturday, June 16th.

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Where nothing is said in a contract of hiring about time but a reservation of *weekly* wages, it is a *weekly* hiring only. Therefore where the contract was for the servant *to live* with his master, the latter finding him board and lodging, and paying him 2s. 6d. per week, no settlement could be gained by service for more than a year under such contract.

TWO justices removed *Thomas Pritchard*, his wife, and daughter, by name, from the parish of *Pucklechurch* to the parish of *Westerleigh*, both in the county of *Gloucester*. The Sessions, on appeal, quashed the order, subject to the opinion of this Court on the following case. The pauper *T. Pritchard* being settled in *Westerleigh* about ten years ago hired himself to *T. King* of *Pucklechurch* for eight weeks ending at *Midsummer*, at 5s. per week: at which time he hired himself again to the same master, at 4s. per week till the *Michaelmas* following. At *Michaelmas* he entered into a new agreement with his master to live, the master finding him board and lodging, and paying him 2s. 6d. per week: but no time was fixed or talked of by the master or servant for the duration of the contract. When the summer season arrived the pauper said to his master, "I must have more now I believe, master:" The master said, "How much more?" and his wages were increased. And so as the winter or summer succeeded his wages were accordingly reduced or increased. At the time when the alteration of wages took place there was no conversation as to leaving the service or dissolving the contract. The alterations of wages took place at the beginning of the week. He entered and left his service on the same day of the week, being *Sunday*. There was a general settlement at the time he left the service with respect to wages,

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and ſome diſpute; but he could not remember what it was. The pauper was more than once abſent from his maſter's ſervice two or three days at a time to ſee his friends with his maſter's conſent. He ſerved in the whole five years and a quarter, and received money on account of wages at different times, ſometimes a guinea and ſometimes more; but there was no complete ſettlement of wages till he and his maſter parted. But at the time he was not paid ſo much as he thought he was entitled to; but whether on account of abſence or not he did not know.

Abbott and *Hall*, in ſupport of the orders of ſeſſions, relied on the laſt agreement of the ſervant *to live* with his maſter, without any limitation of time; which the law therefore deemed to be a hiring for a year; and which was not varied by the circumſtance that the wages were to be *paid* weekly; as in *R.* v. *Seton and Beer* (*a*), and *R.* v. *Hampreſton* (*b*). And they argued that this was different from the caſes of *R.* v. *Bradninch* (*c*), where the contract of hiring was by the week, and *R.* v. *Clare* (*d*), where it was by the month; and from *R.* v. *Newton Toney* (*e*), and *R.* v. *Hanbury* (*f*), where the hiring was *at ſo much a week*, which was conſidered as the ſame thing; and, in the latter caſe, either party might part at a week's notice. That admitting the intention of the parties as to the generality or duration of the hiring to be ambiguous, the fact of the pauper's having continued in the ſervice above a year was a circumſtance which might be taken to explain the original intent; as in *R.* v.

(*a*) 2 *Conſt.* 200. (*b*) 5 *Term R p.* 205. (*c*) *Burr.* S C. 662.
(*d*) *Ib.* 829. (*e*) 2 *Term Rep.* 453. (*f*) 2 *Eaſt*, 423.

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Longwhatton (*a*), where fervice for above a year as a domeftic fervant, there being no evidence of the contract, was deemed fufficient to raife a prefumption of a general hiring. And here the mafter agreed to find board and lodging for the pauper as a domeftic fervant. Then the mere alteration of wages in the middle of the year, the fervice continuing the fame, will not prevent the gaining of a fettlement; as in *R.* v. *Alton* (*b*).

Gibbs and *Taunton* contrà were ftopped by the Court.

Lord ELLENBOROUGH C. J. If nothing be faid as to the term of the fervice but that the fervant fhall have weekly pay, it muft primâ facie be underftood that the parties intended a weekly hiring and fervice. But circumftances may fhew a different intent. Then are there fuch circumftances in this cafe, from which we can fairly collect that the parties intended a hiring for a year? In the firft inftance the hiring was for a fpecific term of eight weeks; the fecond hiring was alfo for a definite time fhort of a year. No time was mentioned at the third hiring, but it was a hiring at *weekly* wages. Then it falls within the cafes of *Dedham*, of *Bradninch*, of *Newton Toney*, and others of the fame clafs; where a hiring at weekly wages has been holden to be a weekly hiring. And if it wanted any additional circumftance the conduct of the parties themfelves afterwards fhews that they fo confidered it; for the fervant left his mafter at the end of the week in the middle of a year. If an indefinite hiring were ftated on a record, and nothing fhewn to control it, it will be deemed a hiring for a year: but

(*a*) 5 *Term Rep.* 447. (*b*) *E.* 24 *Geo.* 3. 2 *Conft.* 382.

that

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that is in the absence of any circumstance from whence a different intent is to be collected: and here weekly wages being reserved, and nothing else added to shew an intention to extend the contract further, will induce the conclusion in law of a weekly hiring and service intended by the parties. There is a current of authorities to this point.

GROSE J. A reservation of weekly wages will make a weekly hiring, if nothing appear to the contrary. And here the circumstances do not furnish any other inference. In the first and second hirings certain definite times were mentioned, where it was meant to extend the contract beyond a weekly hiring: but at the third hiring there was nothing said, from whence the intended duration of it was to be collected, but the reservation of weekly wages. It appears also that the wages varied from time to time at the different seasons of the year. That cannot furnish the inference of an implied hiring for a year; for then the wages must have continued the same as they were at first settled. The third hiring, therefore, was not a general hiring, but a hiring from week to week.

LAWRENCE J. I thought the law had been perfectly settled since the case of *Newton Toney*; for the rule was there laid down, that if there were any thing in the contract of hiring to shew that it was intended to be for a year, the reservation of weekly wages would not control it: but if the payment of weekly wages were the only circumstance from which the duration of the contract was to be collected, it must be taken to be only a weekly hiring. Then what is this but a weekly hiring by that rule? The point having been before precisely

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determined, this case ought not to have been brought up.

LE BLANC J. Neither the first nor the second hiring can be pretended to give a settlement. Then as to the third, it is clearly a hiring for weekly wages, and there is nothing to denote that it was for a year except that no time was mentioned, from whence it is contended that in contemplation of law it must be taken to be yearly hiring. But it has been holden that a reservation of weekly wages, without more, is only a weekly hiring. But if there were any doubt of that, there is another circumstance confirmatory of that construction; for the servant in the middle of the year required an advance of wages, which the Master acceded to without any question; a circumstance which was scarcely probable to have happened if the parties had considered that they had contracted for a year. These circumstances therefore rebut any implication of law, that this was a yearly hiring.

Lord ELLENBOROUGH C. J. then added, that he hoped it would be understood in future, that where nothing was said in the contract about time, but a reservation of weekly wages, it was only a weekly hiring.

Order of Sessions quashed.

Monday, June 18th.

The KING *against* The Sheriff of BERKS.

Where a writ of fi. fa. expires in the vacation, the sheriff need not return it till the first day of the ensuing Term, and has the whole of that day to file it.

THE Sheriff was ruled on *Saturday* the 12th of *May* last, two days before the end of *Easter* term, to return a writ of *fieri facias*; but no return was made till

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the firſt day of this term; on which day an attachment was obtained againſt him for not returning it. *Gibbs* thereupon moved to ſet aſide the attachment, on the ground that the rule having expired in the *vacation*, the ſheriff had until the firſt day of this term to return it, and was not bound to make his return within the ſix days given him by the rule. *Garrow* and *T. Carr* relied on the rule of Court, *Mich.* 32 *Geo.* 3. (*a*), to ſhew that the ſheriff ought to have returned the writ within the ſix days; which rule directs that all writs ſhall be returned by the ſheriff on the day on which the rule for returning the ſame expires.

The Court however, on inſpection of the rule, were of opinion that it could only apply to writs returnable in term; becauſe it ſays, at the concluſion of it, that "in "default thereof the plaintiff ſhall be at liberty to move "for an attachment *on the next day*," which can only be moved in term time.

The Maſter afterwards put into the hands of the Court an anonymous caſe in *Tr.* 30 *Geo.* 3. taken by the late Maſter *Benton*, which was read as follows:

"Where a rule to return a writ is ſerved only three days before the end of a term, the ſheriff has until the firſt day of the next term and all that day to file the return."

Per Curiam, Rule abſolute for ſetting aſide the attachment (*b*).

(*a*) 4 *Term Rep.* 496.

(*b*) Upon inquiry it appears that many ſuch writs are filed in vacation with the Cuſtos Brevium. But the ſheriff of London and Middleſex in particular ſeldom returns them until the firſt day of the following Term.

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Thompson and *Anderson* of the second part, and the several underwriters of the third part; which after reciting (in substance) that *Thompson* and *Anderson*, and the said other persons parties thereto of the third part, had insured the ship *Thomas* upon her said voyage, at and from *Riga* to her port of discharge in *England*; that the ship had been and then was detained under the said embargo at *Riga*; and that the plaintiffs being sole owners of the *Thomas* had given, according to the law and usage of merchants, due notice of abandonment thereof, and had called upon the several underwriters for the amount of their respective subscriptions, which they had respectively agreed to pay on having the ship assigned to *Thompson* and *Anderson* upon the trusts thereinafter mentioned; purported to be an assignment or transfer by the plaintiffs of the ship *Thomas*, and all the interest, property, claim, and demand of the plaintiffs of, in, to, or out of the said ship and her appurtenances to *Thompson* and *Anderson*, upon the trusts therein mentioned. The said indenture was executed by the plaintiff *M'Carthy*, (but not by the other plaintiffs,) by *Thompson* and *Anderson*, and by the several other persons parties thereto of the third part. In *July* 1801 *R. Corner*, one of the plaintiffs, as master of the ship, drew a bill at *Riga* for 718*l.* 3*s.* 6*d.* upon Mr. *Halliday* the agent of the underwriters on the ship, for the purpose of paying for masts, sails, cables, repairs, and other charges on the body of the ship: This bill was duly paid by Mr. *Halliday* in *London*. And on the 30th of *September* 1801 Captain *Corner*, as master of the ship, received at *Plymouth* of the agents of the freighters 500*l.*, part of the freight, to enable him to pay seamen's wages and the charges of delivering the cargo; and the last-mentioned sum of money was duly applied to those purposes. The under-

writers

writers upon the ſhip claimed the freight, and the ſum of 1742*l.* 6*s.* 10*d.* the balance of ſuch freight, after deducting the 500*l.* has been paid by the freighters of the ſhip to the agent for the underwriters, under an indemnity from them againſt any claims which might be made thereto either by the plaintiffs or by the underwriters on the freight. The agent for the underwriters on ſhip gave a receipt, dated the 7th of *December* 1801, for the ſaid 1742*l.* 6*s.* 10*d.* as for freight of the ſaid cargo. The queſtion for the opinion of the Court was, Whether the plaintiffs were entitled to recover? If they were, the verdict to ſtand; otherwiſe a nonſuit to be entered.

This caſe was firſt argued in *Hilary* term laſt by *Hullock* for the plaintiffs and *Giles* for the defendant, and again in this term by *Park* for the plaintiffs and *Erſkine* for the defendant. The Court having directed the ſecond argument to be confined to the conſideration of the effect of an abandonment of a *ſhip* upon the right to the accruing freight, it is ſufficient to ſtate the ſubſtance of the arguments on that point, which was recently under conſideration in the caſe of *Thompſon* v. *Rowcroft* (*a*).

For the plaintiffs it was argued, that the law of *England*, recognizing ſhip and freight as two diſtinct objects of inſurance, conſequently recognizes them as diſtinct ſubjects of abandonment; and therefore as a ſimple inſurance of *ſhip*, without more, does not cover *freight*, ſo an abandonment of the former muſt be always underſtood with an implied reſervation of the latter, otherwiſe the underwriter on ſhip would gain that for which he had confeſſedly paid no equivalent. The laws of *France*

(*a*) 4 *Eaſt*, 34.

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and ſome other countries differ from our own in this reſpect, conſidering freight as a mere acceſſary of and inſeparably attached to the ſhip. 2 *Valin*. 58. *Pothier*, *c*. 1. *ſ*. 2. *par*. 36. 2 *Emerigon*, 221. The freight there being reckoned as part of the value of the ſhip, the underwriter on ſhip is in truth an underwriter on freight alſo. In this caſe, whether the act of the *Ruſſian* government amounted to an embargo or an hoſtile ſeizure (*a*), it was ſufficient at the time to warrant the plaintiffs in abandoning both ſhip and freight to the reſpective underwriters: and if the action had been brought for a total loſs immediately after ſuch abandonment there could have been no defence to it. The circumſtance then of the freight having been ſince earned and received cannot, as between theſe parties, deſtroy the right of action which then accrued. At moſt it is only ſo much ſalvage for the benefit of the underwriters on freight which they are entitled to recover from the freighters. Inſurance is always conſidered as a contract of indemnity (*b*). The underwriter on ſhip engages to indemnify the owner againſt the loſs of the body of the ſhip by certain perils, he taking the benefit of ſalvage of the materials remaining, if any. The underwriter on freight engages to indemnify him from any loſs of the expected profits of the ſhip derived from the carriage of goods, &c. for the particular voyage, he alſo taking the benefit of ſalvage of freight, if any be earned after an abandonment; though from the nature of the contract ſalvage of this ſort ſeldom accrues, where the ſhip itſelf or the voyage is ſo far endangered as to warrant an abandonment. The abandonment

(*a*) In *Beale* v. *Thompſon*, 4 *Eaſt*, 546. it was conſidered in the nature of an embargo, and not of a capture.

(*b*) *Goſs* v. *Withers*, 2 *Burr*. 698. and *Hamilton* v. *Mendez*, ib. 1210.

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donment then to either underwriter can only be co-extensive with the interest which he insured: and the insurer of ship, knowing that he did not protect the freight, must be taken to have accepted the abandonment with an implied reservation of the right of the owner to freight, if earned in the voyage insured. He takes the ship subject to all the existing contracts which bound the owner in respect of it at the time of the abandonment. And it was decided in *Beale* v. *Thompson* (a) that the hostile embargo in *Russia* did not put an end to the prior contracts made for that voyage. Then the insurer cannot be in a better situation after an abandonment than the insured from whom he derives title, who before he abandoned had contracted with the underwriter on freight in a manner to secure to him eventually the benefit of salvage by the marine law. [*Le Blanc* J. Is it then contended that the contract of insurance runs with the ship? Lord *Ellenborough* C. J. Was it ever heard of that a contract should run with a chattel? Put the case of a man purchasing a waggon as it is going on the road laden with goods, he is not bound to carry the goods to their journey's end, though the carrier, the vendor, who contracted so to do, will be liable on his contract.] The obligation in this case arises from the anomalous nature of the contract, and the permitting of two distinct subjects of insurance in respect of the same subject matter, on which the several rights of abandonment and salvage are consequential. The underwriter on ship, if standing at all in the situation of a purchaser, is at least a purchaser with notice; but in truth he only purchases a right of salvage after an abandonment of the subject matter of his insurance; as the underwriter on freight is the purchaser

(a) 4 *East*, 546.

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of a right of ſalvage of the freight abandoned to him. The abandonment of the ſhip only confers on the inſurer of it a qualified ownerſhip during the voyage inſured, an ownerſhip ſub modo according to the marine law, which recognizes the ſeparate intereſts of the owner in ſhip and freight, and the conſequent ſeparate intereſts of the underwriters on each, in caſe of an abandonment. The caſes of *Thompſon* v. *Rowcroft* (*a*), and *Leatham* v. *Terry* (*b*), went upon the particular terms of the contract of abandonment, and not on the general queſtion.

For the defendant it was inſiſted, that an abandonment to the underwriter on ſhip veſts in him the complete property of it with all its conſequences. The immediate ſubject of the policy is the body or ſubſtance of the ſhip which he inſures againſt actual loſs or deterioration by certain perils; but the inſurance being upon a certain voyage, and the indemnity having been extended to another ſort of loſs, namely of the *voyage* inſured, in which caſe, though the ſubſtance of the ſhip be ſafe, the owner has a right to abandon, it muſt be followed up with all its conſequences, one of which is the benefit of ſalvage, by which all the intereſt in and title to the ſhip is from the moment of the abandonment accepted transferred to the underwriter, he paying to the owner the full value at which the property was inſured. The underwriter on ſhip is not bound to take cognizance of any contract for freight or for inſurance of it, to which he is no party. For it would be abſurd to ſay that after he had purchaſed the whole property aſſigned to him for its full value he could not do what he pleaſed with his own. If the owner ſtood his own inſurer of the freight there could

(*a*) 4 *Eaſt*, 34. (*b*) 3 *Boſ. & Pul.* 479.

be

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be no doubt but that a general abandonment of the ſhip, without ſpecially reſerving the freight, would convey all his intereſt to the underwriter; and the latter would not be bound to accept a qualified abandonment. But even if ſuch underwriter had notice of the exiſting contracts of affreightment and inſurance, it could not alter his ſituation; for the right to accruing freight being in reſpect of the property in the ſhip and the carriage of the goods to their ultimate place of deſtination, it muſt follow ſuch property prior to and till the arrival of the goods. It is with good reaſon therefore that the laws of *France* and other countries conſider freight as ſo inſeparable in its very nature from the property in the ſhip, that they do not admit them to be ſeparately inſured, and this caſe ſhews the inconſiſtency of the contrary practice. But ſtill no collateral contract of the owner with the inſurer on freight can abridge the right of property transferred to the underwriter on ſhip by the abandonment of it to him: and the owner, who has by his own act in making ſuch abandonment diveſted himſelf of the title to freight, and put it out of the power of the inſurer on freight to avail himſelf of the benefit of ſalvage reſerved to him in the event by his contract, can have no right to recover upon the freight policy under pretence of an abandonment, without benefit of ſalvage. From the moment of the abandonment accepted by the underwriter on ſhip all the expences of repair and riſk of the ſhip are transferred to him, and therefore he muſt in juſtice be entitled to derive all the benefit of it; for the benefit of ſalvage would be merely nominal if, notwithſtanding an abandonment to him and his paying the full value of the ſhip as for a total loſs, he were ſtill obliged to purſue the voyage inſured at his own riſk and expence for the benefit of the inſured.

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insured. The benefit of salvage means every thing which remains of the ship at the time of the abandonment, without further claim of the insured. It is sufficiently hard upon the underwriter on ship to be compelled to pay the whole value of the insurance upon the supposition of a total loss of the voyage, when it turns out that the voyage was not lost; but it is quite inconsistent with the abandonment, which is the voluntary choice of the assured to deny the eventual usufruct of the property so abandoned. If after abandonment, as for the loss of the voyage, the assured may still retain the vessel for the performance of all the contracts which he had previously entered into in respect of the ship, this reservation might extend to several voyages; and even the same voyage may be protracted for two or three years from length of way or casualties, as sometimes happens with *East India* ships, during which time the repairs of the ship might equal her first cost: and thus the assured, after receiving the full value of the ship, and deriving interest from the money, and getting rid of all further expence, would still be receiving the earnings of the ship, in lieu of the underwriter who had paid the value of it and borne all the expences.

In reply it was observed, that some of the charges of prosecuting the voyage, such as sailors' wages and provisions, would be borne by the underwriters on freight, and not by those on the ship, according to *Robertson* v. *Ewer* (*a*), and other cases there cited. And as to other charges it was for the underwriters on ship to consider whether it were worth their while under all the cir-

(*a*) 1 *Term Rep.* 127.

cumstances

cumſtances to proſecute the voyage inſured after an abandonment. 1804.

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Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered judgment. The novelty of the queſtion in this caſe, the value of the property, and the extent to which ſome of the principles laid down in the argument ſeemed to lead, made the Court deſirous of every information on the different points which might ariſe between the ſeveral parties intereſted before we came to our deciſion; and therefore we wiſhed for the ſecond argument on the effect of an abandonment of the ſhip on the accruing freight. If the queſtion which ariſes upon this caſe be ſtripped of all extraneous circumſtances and conſiderations, it appears to us to reſolve itſelf into this ſingle point; viz. Whether the freight have been in this caſe loſt, or not? If the fact be merely looked at, freight in the events which have happened has not been loſt, but has been fully and entirely earned and received by or on the behalf of the plaintiffs the aſſured: And if ſo, no loſs can be properly demandable againſt the underwriters on freight, who merely inſure againſt the loſs of that particular ſubject by the aſſured. But if it have or can be conſidered as having been in any other manner or ſenſe loſt to the owners of the ſhip, it has become ſo loſt to them, not by means of the perils inſured againſt, but by means of an abandonment of the ſhip, which abandonment was *the act of the aſſured themſelves*, with which therefore, and the conſequences thereof, the underwriters on freight have no concern. It appears to us therefore that quacunque viâ datâ, that is, whether there has been no loſs at all of freight, or being ſuch, it has been a loſs only occaſioned

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occasioned by the act of the plaintiffs themselves, that they are not entitled to recover; and that therefore a nonsuit must in that case be entered.

Judgment of nonsuit.

Tuesday, June 19th.

BARING and Others *against* CHRISTIE.

The 25th article of the treaty of *February* 1778, between *France* and *America*, which requires the vessels of the two allies, in case either is at war, to be furnished with a passport expressing (inter alia) *the place of habitation* of the commander of the vessel, is not complied with by a passport granting leave "to *G. D.* commander of the ship called the *M. V. of the town of P.*, of the burthen of," &c.; such description of place being applicable only to the *ship* as the last antecedent, which is further described by her burthen in a continuing sentence; and therefore the plaintiff was holden not entitled to recover upon a policy of insurance on such ship warranted *American*, which had been captured by the French and condemned as prize.

THIS was an action of insurance on goods on board the ship *Mount Vernon*, warranted an *American* ship, upon a voyage at and from *Philadelphia* to *London*, with liberty to touch at one port in the Channel. It was averred in the declaration, that Messrs. *Willings* and *Francis*, for whom the plaintiffs were agents, were the persons interested in the goods insured, and that the ship and cargo were in the course of the voyage insured taken as prize by persons unknown. At the trial at *Guildhall* a special verdict was found, stating in substance, that the defendant subscribed the policy in question, and that the parties named were interested in the goods insured. That on the 2d of *June* 1796 the said ship sailed with her cargo from *Philadelphia* in the United States of *America* for *Cowes* in the *Isle of Wight*, and for such other port or place after her arrival at *Cowes* as the plaintiffs should direct. That the ship previous to her failing from *Philadelphia* cleared out from thence for *Hamburgh*, and at the time of her sailing until and at the time of her capture had on board the following documents, 1. a certificate of clearance, with a manifest of her cargo annexed thereto, viz. "Port of *Philadelphia*. These are to certify "all whom it doth concern, that *George G. Dominick* "master or commander of the ship called the *Mount* "*Vernon*, burthen 424 $\frac{27}{95}$ tons, mounted with guns, "navigated

" navigated with men, United States built, and " bound for *Hamburgh*, hath here taken on board cargo, " as per manifeſt annexed, and hath here entered and " cleared his ſaid veſſel according to law. And theſe " are further to certify, that it appears by the original " regiſter now produced to us that the above-mentioned " ſhip was regiſtered at *Philadelphia* the 2d of *May* 1796. " Given under our hands and ſeals of office at the " Cuſtom-houſe, this 30th of *May*, *John Graff* Deputy " Collector, *W. Tilton* D. &c." That the ſaid manifeſt of the cargo was entitled, " Manifeſt of the cargo of the ſhip *Mount Vernon*, *George G. Dominick* maſter, bound for *Cowes* and *Hamburgh* in *Europe*." 2. The following ſea-letter or paſſport, viz. (The ſpecial verdict here ſet forth a fac ſimile of the document in the form of a triplicate paſs, having three columns, the firſt in the *French*, the ſecond in the *Engliſh*, and the third in the *Dutch* language. What follows is a tranſlation of the *French*, which was the only part relied on in the argument as moſt favourable to the conſtruction contended for on the part of the plaintiffs.)

(FRENCH PASS.)

(*Tranſlated from the* French.)

" GEORGE WASHINGTON, Preſident of the United States of *America*.

" To all who ſhall ſee theſe preſents. Be it known, that leave and permiſſion has been granted *to* George G. Dominick, *maſter or commander of the ſhip called the* Mount Vernon, *of the town of* Philadelphia (*a*), *of the burthen of*

(*a*) In the *American* and *Dutch* columns it was thus expreſſed: " leave and permiſſion are hereby given to *George Dominick*, maſter or commander of the ſhip called the *Mount Vernon*, of the burthen of 424 $\frac{2}{5}$ tons or thereabouts, *lying at preſent in the port of Philadelphia*, bound for *Hamburgh*."

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424 $\frac{47}{95}$ *tons, or thereabouts*, being at present in the port of *Philadelphia* and bound for *Hamburgh*, loaded with sundries, per manifest: that after this ship has been visited and before his departure he shall make oath before the officers authorized for this purpose, that the said ship belongs to one or more citizen or citizens of the United States of *America*, the act whereof shall be placed at the foot of these presents. And in like manner that he will keep and cause to be kept by his crew the maritime ordinances and regulations, and enter a list signed and confirmed by witnesses, containing the names and surnames, the place of birth, and residence, of the persons composing the crew of his ship, and of all those who shall embark therein, whom he shall not receive on board without the knowledge and permission of the officers thereto authorizing. And in every port or harbour where he shall enter with his ship he shall show the present permission to the officers authorized thereto, and shall make a faithful report to them of what has passed during his voyage, and he shall carry the colours, arms, and ensigns of the United States during his said voyage. In testimony whereof we have signed these presents, and have caused the seal of the United States to be thereto affixed, and to be countersigned by *A.E.* deputy collector at *Philadelphia*, the 30th of *May* 1796."

The special verdict then set forth certain facts relative to the ownership of the *Mount Vernon*, and her register and certificate of registry, and other documents, the regularity of which as applied to the voyage insured were questioned in the argument. But it is unnecessary to state these and other facts, upon which no opinion was given by the Court. It is sufficient, in order to raise the only

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only point upon which the judgment ultimately turned; to state the finding of the jury, that the documents stated were the clearance, register, certificate of registry, manifest, and *passport* relating to and on board of the said ship for the voyage on which she sailed from *Philadelphia* on the 2d of *June* 1796. That before the making of the policy the plaintiffs had determined that the ship after touching at *Cowes* should proceed from thence to *London*, and there finish her voyage, which was not known to the master at the time she sailed from *Philadelphia*; who then intended after touching at *Cowes* to proceed to *Hamburgh* and there finish the voyage. That the ship was built within the United States of *America* in the beginning of the year 1796; and when she sailed from *Philadelphia*, until, and at the time of the capture after mentioned, was the sole property of one *Duncanson*, who was born a *British* subject, but was domiciled, and resided and carried on trade in the United States of *America* from *August* 1794 till after the 11th of *August* 1796; but was not entitled by the laws of the United States to be naturalized and become a citizen of the United States at the time the insurance in question was effected, nor when the ship sailed on the voyage insured, or was captured, nor until the 11th of *October* 1796, on which last-mentioned day he was naturalized and became a citizen of the United States. That on the 9th of *June* 1796 the ship, while proceeding on her voyage from *Philadelphia* to *Cowes*, was with her cargo captured as prize by a *French* cruizer, and was afterwards taken into the port of *St. John* in the *Spanish* island of *Porto Rico*; and while she remained there she and her cargo were proceeded against by the captors in the *French* provisional tribunal of prizes in *St. Domingo*. The special verdict then

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then ſet out the ſentence of condemnation of that court (upon which alſo much argument turned); and then ſet forth the 12th, 23d, 25th, and 27th articles of the treaty of 1778 between *America* and *France*; by the 25th article of which "it is agreed (*a*) that in caſe either of "the parties thereto ſhould be engaged in war, the "ſhips and veſſels belonging to the ſubjects or people "of the other ally muſt be furniſhed with ſea-letters or "paſſports, expreſſing the name, property, and bulk of "the ſhip, as alſo the name *and place of habitation of the* "*maſter or commander of the ſaid ſhip*, that it may appear "thereby that the ſhip really and truly belongs to the "ſubjects of one of the parties; which paſſport ſhall be "made out and granted according to the form annexed "to this treaty," &c. The ſpecial verdict concluded by ſetting forth two acts of the United States, one impoſing a duty on the tonnage of ſhips, and another regulating the regiſtering of ſhips; the object of which was to diſcriminate ſhips of the United States and owned by *American* citizens from thoſe of foreign countries or owned by foreigners. The application of theſe acts, which alſo furniſhed much matter for argument, became in the event unneceſſary to be conſidered.

The caſe was argued at great length and with much ability, upon a variety of grounds, by *Puller* for the plaintiffs in error in *Hilary* term laſt, and by *R. Carr* for the defendant in *Eaſter* term following: But as judgment was ultimately given upon an objection to the want of a

(*a*) This is taken from the *American* copy, which, ſo far as reſpects the point in judgment, correſponded with the *French* copy. In other reſpects there were variations, which furniſhed ground of argument on other parts of the caſe not material to be ſtated.

5 deſcription

description in the passport of the place of habitation of the master of the ship, which rendered it unnecessary for the Court to give any opinion upon the other points made at the bar, it is needless to detail the arguments. After time taken to advise upon the case the judgment of the Court was now delivered by

Lord ELLENBOROUGH C. J. This case comes before the Court on a writ of error from the Court of Common Pleas, upon a special verdict found upon the trial of the cause before Lord *Alvanley*, to whose directions on that trial a bill of exceptions was tendered. And on the argument here several considerable questions have been raised, and discussed with great learning and ability on the one side and on the other: and if it were necessary for us to determine the several points which have been raised, as to whether the ship did or did not sail on the voyage insured; whether the ship were or were not an *American* ship, by reason of the tonnage act of the United States of that country; whether the passport, supposing its form unobjectionable, were a sufficient document, owing to some vice in the mode of obtaining it; whether the evidence given of the ship's condemnation were properly received; and whether such sentence, if properly received, be conclusive against the ship being *American*; it would be proper to state the record more at length than can be now required; as we think the objection which has been made to the form of *the passport* is an answer to the claim of the plaintiffs in error. It will therefore be sufficient very shortly to state so much of the special verdict as applies to that point only.

This action is on a policy of insurance, dated the 18th of *June* 1796, on goods on board a ship called the *Mount*

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Vernon, an *American* ship, at and from *Philadelphia* to *London*, with liberty to touch at one port in the Channel. And the special verdict, after finding the making the policy, the subscription of the plaintiffs in error, the interest as averred, the sailing of the ship, and other matters not material to the ground of our decision, finds that by the 25*th article of the treaty* between *France* and *America*, which treaty was dated the 6th of *February* 1778, it was provided, "that in case either of the parties should be "engaged in war, the ships and vessels belonging to the "people of the other ally must be furnished with sea-"letters or passports expressing the name, property, and "bulk of the ship, *as also the* name AND PLACE OF HABI-"TATION OF THE MASTER OR COMMANDER of the said "ship, that it may appear thereby that the ship really and "truly belongs to the subjects of one of the parties; "which pass shall be made out and granted *according to* "*the form annexed to the treaty.*" And the special verdict further finds *the form of the passport*, which the ship had on board at the time of the capture, which was in the *French*, *English*, and *Dutch* languages, in which there is no mention made of the place of habitation of the master, unless it be in that part of the pass, which was in *French*, and ran in this form: "To all who shall see these pre-"sents, be it known, that leave and permission has been "granted to *George G. Dominick*, master or commander "of the *ship called the* Mount Vernon, *of the town of* Phi-"ladelphia, *of the burthen of* $424\frac{27}{95}$ *tons* or thereabouts, "being at present in the port of *Philadelphia*, and bound "for *Hamburgh*, loaded with sundries," &c. &c. not necessary to state. Now as the description of the ship in the said policy clearly contains a warranty that she was an *American* ship, which induces a necessity of her being docu-

documented, as *American* ſhips are required to be by the treaties ſubſiſting between that ſtate and *France*; and as the ſpecial verdict has not found what *the form of the paſſport* was which was annexed to the treaty, we were deſirous, if it could have been aſcertained, to have had it made a part of the ſpecial verdict; as by that we might have been enabled to have decided more ſatisfactorily to the perſons intereſted in this inſurance as to *the form of the paſſport* than we can as the caſe now ſtands: and if we had thought it ſufficient, then upon the other points which have been made in argument. But as this matter has not been added, we need only ſay, whether *the paſſport* found on board the ſhip be or be not conformable to the requiſites preſcribed by the 25th article of the treaty; that is, whether *the town of* Philadelphia can by any fair conſtruction be referred to *Dominick*, *the maſter of the ſhip*, or whether it do not according to the rules of ſound conſtruction relate, not *to him*, but *to the ſhip*: and, if it do, the conſequence is that the ſhip had not *ſuch a paſſport* as is required by this article of the treaty. And giving every weight to the arguments uſed in ſupport of the paſſport, we do not think that we can, without doing great violence to the plain and obvious import of its language, ſo conſtrue it, and ſay that the paſſport is that which the treaty requires. The rule of law as well as of grammar is that "ad proximum antecedentem *fiat relatio, niſi impediatur ſententia*;" for which, if authorities were wanting, *Jenkins Centuries*, 180, *Dyer*, 46. *b.* and 5 *Co.* 68. Lord *Cheyney*'s caſe, may be referred to. In this paſſport "*the ſhip called the* Mount Vernon" is unqueſtionably the laſt antecedent; and though it has been ſaid that *the port*, and not *the town*, of *Philadelphia* is the proper deſcription of a *ſhip*, yet as a *port* may be within

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a *town*, there is no inconſiſtency in deſcribing a ſhip as of the town within which the port lies; there is nothing in the matter which neceſſarily prevents its reference to the *ſhip*, and applies it to the *maſter*. But the proper reference does not in this caſe depend merely on this rule; for the words "*of the burthen of* 424 *tons*," which is a continuance of the ſame ſentence, and is a further deſcription of the ſame thing, can refer only to the *ſhip*: And of this opinion Lord *Alvanley* appears clearly to have been in the caſe of *Baring* v. *Claggett*, 3 *Boſ.* & *Pul.* 212.; only that it was unneceſſary in that caſe to decide upon the ground of this conſtruction of the paſſport, inaſmuch as that caſe ſtated that the ſhip had on board this paſſport, "*together with the uſual documents taken out by* American "*veſſels*;" under the terms of which general admiſſion Lord *Alvanley* thought the Court at liberty to preſume that ſhe had on board a *ſea letter* expreſſing the name and *place of abode of the maſter*, conformably to the treaty. In deciding merely on this point, all other queſtions between the parties remain open for future deciſion, if the plaintiffs in error, in an action to be brought againſt any other underwriter, ſhall be able to ſhew that the paſſport uſed in this caſe is that which *American* ſhips ought to be provided with; either by giving evidence that it is according to the form annexed to the treaty, or that which has been adopted by ſome ſubſequent treaty. As the caſe now ſtands, our opinion is, that the judgment of the Court of Common Pleas given for the defendant muſt be affirmed.

Judgment affirmed.

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BLOXAM Knt. and Others, Assignees of WARD, a Bankrupt, *against* HUBBARD.

Tuesday, June 29th.

1. An order of the Lord Chancellor made under the fiat. 5 *Geo.* 2. *c.* 30. upon the petition of creditors, for removing one of several assignees of a bankrupt's estate, not followed up by any re-assignment or release of such assignee to the remaining assignees, nor by any new assignment of the commissioners under the Lord Chancellor's further order, does not operate to divest the legal estate out of such removed assignee; and consequently he ought to join in an action of trover brought by the assignees for a ship belonging to the bankrupt's estate.

2. But if he be not joined, advantage can only be taken by plea in abatement to the whole action; though the other assignees who sue can only recover their proportional parts.

3. A sale of a ship (which was afterwards lost at sea) made by the defendant, who claimed under a defective conveyance from a trader before his bankruptcy, is a sufficient conversion to enable the assignees of the bankrupt to maintain trover, without shewing a demand and refusal.

4. The ship register acts do not apply to a transfer of property by operation of law, such as from the commissioners to the assignees of a bankrupt.

5. Under the ship register acts 7 & 8 *W.* 3. *c.* 22. *s.* 21., and 26 *Geo.* 3. *c.* 60. *s.* 3, 4, 5. 16., and 34 *Geo.* 3. *c.* 68. *s.* 15, 16., in order to make title to a ship sold at sea, whether in whole or in part, such sale must be acknowledged by indorsement of the certificate of registry in the manner therein described, and a copy of such indorsement be delivered by the vendee to the persons authorized to make registry, (which officers are *directed* to make an entry thereof to be indorsed on the oath or affidavit upon which the original certificate of registry was obtained, and to make a memorandum in the book of registers, and to give notice thereof to the commissioners of the customs;) and it is not sufficient for the vendee to register such ship de novo in another port where he resided, though he removed the ship thither, and she never returned to her original port after the sale.

IN trover, brought to recover two-third parts (*a*) of the ship *Fishburn*, tried before Lord *Ellenborough* C. J. at the sittings after *Hilary* term 1804, at *Guildhall*, a verdict was found for the plaintiffs for 2326*l.* 6*s.* 8*d.* subject to the opinion of this Court upon the following case.

Thomas Ward the bankrupt, being the original and sole registered owner of the ship *Fishburn* belonging to the port of *Newcastle upon Tyne*, cleared the said ship outwards for the *Baltic* in *April* 1800, where she was detained for a considerable time by the embargo of the emperor of *Russia*. On the 9th of *November* 1801 *Ward* by regular bill of sale assigned the whole ship *Fishburn*, *then at sea*, in consideration of 4000*l.* to the defendant, who then resided in *London*. The grand bill of sale of the whole ship was also delivered to the defendant. On the 2d of *December* 1801 *Ward* committed an act of bankruptcy, upon which a commission afterwards issued against him, and he was duly declared a bankrupt. On the 2d of *January* 1802 the defendant registered the said

(*a*) One third part was recovered by *Heath*, in a former action of *Heath* v. *Hubbard*, 4 *East*, 110.

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ſhip de novo *in the port of* London, and the original certificate granted to *Ward*, which purported on the face of it to be of the ſhip *Fiſhburn* belonging to the port of *Newcaſtle-upon-Tyne*, was delivered up and cancelled. On the 19th of *February* 1802 the defendant ſold the whole of the ſaid ſhip by public auction to *Brown* and others for 3630*l.*, (the net proceeds being 3489*l.* 10*s.* 3*d.*), and by bill of ſale of the 5th of *April* 1802 aſſigned her to them, who afterwards ſent her to ſea, where ſhe was loſt on the 20th of *February* 1803. The *Fiſhburn* never returned to the port of *Newcaſtle-upon-Tyne* ſince ſhe cleared outwards from that port for the *Baltic* in *April* 1800; but the embargo being taken off ſhe arrived at *Plymouth*: but before the execution of the bill of ſale by *Ward* to the defendant ſhe ſailed again, and was abſent at the time of the execution thereof. She afterwards returned to the port of *London*, and immediately thereupon the defendant obtained a new regiſter. No transfer of property in the ſame ſhip, or any part thereof, appears in any document of the Cuſtom-houſe of *Newcaſtle-upon-Tyne* either to the plaintiffs or to the defendant; and no indorſement of transfer was ever made to the plaintiffs on the certificate of the ſhip's regiſtry; nor have the plaintiffs taken out a new regiſter; and no demand was proved on the trial to have been made of the ſhip upon the defendants. The plaintiffs, together with one *John Glen Johnſton*, (who did not join in the preſent action,) were appointed aſſignees of the eſtate and effects of *Ward* under the above-mentioned commiſſion, by an aſſignment dated the 13th of *April* 1802. On the 22d of *January* 1803 the Lord Chancellor by his order removed *J. G. Johnſton* from being an aſſignee; which order reciting that a petition had been preſented to the Lord Chancellor by the plaintiffs, being three of the creditors, and three

of

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of the assignees, stating that the said *J. G. Johnston* on the 7th of *December* 1801, being prior to the date of the said commission, received from the bankrupt, whilst he was a prisoner for debt in the King's Bench prison, and after he had committed one or more act or acts of bankruptcy, certain bills of exchange, which bills *J. G. Johnston*, contrary to his undertaking to that effect, had refused to deliver up for the benefit of the estate of *Ward*, and that *J. G. Johnston* had departed these kingdoms and was gone to *Petersburgh* in *Russia*; and praying (inter alia) that *J. G. Johnston* might be discharged from being one of the assignees of *Ward*'s estate, concluded as follows: "Now upon hearing the said petition read and what was "alleged by the counsel for the petitioners, I do order "that the said *J. G. Johnston* be forthwith removed "from being assignee of the said bankrupt's estate and "effects; and let him and his partners be restrained "from receiving any dividend upon their debt proved "under the commission against the said *Thomas Ward* "until my further order. *Eldon* C." No re-assignment, release, or other instrument hath been executed by *J. G. Johnston* to the plaintiffs, nor any new assignment by the commissioners in consequence of the said order. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover in this action? If the Court should be of opinion that they were so entitled, then the verdict to stand, and judgment to be entered as the Court should direct: otherwise a nonsuit to be entered.

Hall for the plaintiffs, after observing that this was the case of a trader, who having before his bankruptcy disposed of a ship at sea to the defendant had neglected to perform the requisite acts for conveying the property

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to him according to the provisions of the register acts, for want of which it became vested in the assignees of the bankrupt, stated three objections which he expected to be made to the recovery of such assignees. 1st, That *J. G. Johnston*, one of the original assignees of the bankrupt's estate, ought to have been joined in the action, the legal estate still remaining in him until a new assignment from the old to the new assignees, notwithstanding the Lord Chancellor's order to remove him. But the effect of that order was to divest the legal estate out of *Johnston* and vest it in the three other assignees, the plaintiffs. The bankrupt laws enable the commissioners to convey the bankrupt's property to assignees, who are joint trustees for the creditors. On the death of one of the assignees it survives to the others, and the order in question has caused the legal death of *Johnston*. The Lord Chancellor has a general and entire jurisdiction over these matters. The stat. 5 *Geo.* 2. *c.* 30. *s.* 30. only directs that in case of the removal of any assignee and the appointment of another by the creditors, the old assignee shall assign over to the new assignee: but that does not appear to be necessary where no new assignee is appointed. And *s.* 31. directs that where it shall be found necessary to vacate the first assignment and to make a new one, "the Lord Chancellor, upon petition of any creditors, may make such order therein as he shall think just and reasonable." "And in case a new assignment shall be ordered to be made as aforesaid, such debts, effects, and estate of such bankrupt shall be thereby effectually and legally vested in such new assignees." It is not necessarily required to make such order for a new assignment (*a*). And indeed

(*a*) A precedent was referred to in *Co. Bank. L* 2 vol. 108. intitled "Assignment by one assignee to himself and a new assignee; the former assignee

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indeed where the depoſed aſſignee is abroad the Lord Chancellor's order on him to aſſign would be nugatory; and if the remaining aſſignees could not make title without him, the bankrupt laws could not be carried into execution. In the caſe ex parte *Bainbridge* (a), on the death of the laſt ſurviving aſſignee, leaving an infant heir at law, the Lord Chancellor made an order on the commiſſioners to execute a new aſſignment to two new aſſignees choſen. The joining in the action the depoſed aſſignee would be to annul in effect the Lord Chancellor's order, which not only diſcharges him, but reſtrains him from receiving any part of the bankrupt's eſtate. But if he were joined he would be empowered to receive what was recovered in the action. The Lord Chancellor has a ſimilar power in other caſes; as by ſtat. 36 *Geo.* 3. *c.* 90. *ſ.* 1. where any truſtees in whoſe names ſtock ſtands are abſent out of the juriſdiction, or not amenable to proceſs, or become bankrupt, &c. he may order the remaining truſtees to convey, and in other caſes may by his order diveſt the legal eſtate out of ſome, and veſt it in others. [*Le Blanc* J. There is an expreſs authority given by the act in that caſe to accompliſh the object.] At any rate this objection, if valid, would only go to one-fourth of the property, and the plaintiffs, the three other aſſignees, would be entitled to recover the other three-fourths, there being no plea in abatement, and this being an action of tort; according to *Addiſon* v. *Overend* (b), and *Sedgeworth* v. *Overend* (c).

" ſignee having abſconded and become bankrupt." But upon inſpection it appears that the commiſſioners were parties to the new aſſignment.

(a) 6 *Veſ.* 451.

(b) 6 *Term Rep.* 766. and vide *Scott* v. *Goodwin*, 1 *Boſ.* & *Pull.* 73 and 75.; where the diſtinction between actions of contract and tort in this reſpect is ſhewn.

(c) 7 *Term Rep.* 279.

2dly,

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2dly, The want of a converſion is objected; but a ſlight act will amount to it where a defendant has no title. The uſe or miſuſe of a thing is a converſion. A ſale by a ſheriff under an execution of the goods of a bankrupt, made after a commmiſſion of bankrupt iſſued, is in law a converſion (*a*). 3dly, If it be objected, that the plaintiffs as aſſignees ought to have derived title to themſelves, by ſhewing a transfer to them in the mode preſcribed by the regiſter acts 7 & 8 *W.* 3. *c.* 22., 26 *Geo.* 3. *c.* 60., and 34 *Geo.* 3. *c.* 68, it is ſufficient to anſwer that the property is veſted in them by operation of law, and that the regiſter acts do not contemplate ſuch a caſe, but only where property is transferred by the act of the party. Then ſuppoſing the plaintiffs entitled upon the ſtrength of their own title to recover the whole or at leaſt three-fourths, it will be inſiſted, 4thly, that the defendant has a good title. But that is directly contrary to the determination of the ſame facts in *Heath* v. *Hubbard* (*b*), where the Court held that what was done by the preſent defendant, the getting the ſhip regiſtered de novo in the port of *London*, per ſaltum, the ſale being of the ſhip at ſea then belonging to another port, without firſt delivering a copy of the bill of ſale to the officer of the port to which the ſhip then belonged, for the purpoſe of his indorſing an entry of ſuch transfer on the affidavit on which the original certificate of regiſtry was obtained, and making a memorandum thereof in the book of regiſtry, and giving notice of the ſame to the commiſſioners in *London*, as required by ſtat. 34 *Geo.* 3. *c.* 68. *ſ.* 16. was not ſufficient to make a title to the ſhip. But ſuppoſing that conſtruction of the act may be impeached, yet before that queſtion can be raiſed the authority of *Moſs and*

(*a*) *Cooper* v. *Chitty*, 1 *Burr.* 20. (*b*) 4 *Eaſt*, 110.

Others,

Others, assignees of Kirkpatrick, v. *Charnock* (a), must be gotten rid of; for here the registry de novo in the port of *London*, whether sufficient or not in itself to complete the title under the bill of sale, was not done till after the act of bankruptcy, when the title of the assignees had intervened, and prevented its operation, by vesting the property in them. Under these circumstances it was holden in that case that the assignees of the bankrupt might recover the possession of the ship in trover from the vendee, though he had, subsequent to the bankruptcy, complied with all the requisites of the register acts.

Scott contrà. 1st, The mere order of the Lord Chancellor to an assignee to assign away the bankrupt's estate cannot, without an actual re-assignment, operate to divest the property out of such assignee. The Lord Chancellor has no other power over a bankrupt's estate than what is given to him by statute. The stat. 5 *Geo.* 2. *c.* 30. *f.* 26. first empowers the commissioners to transfer the property from the bankrupt to his assignees. By *f.* 30. any assignee removed or displaced by the creditors is required to assign the estate and effects to any other assignee chosen by them, under a penalty in case of refusal or neglect. Then as it may sometimes be necessary to vacate the old and make a new assignment, the Lord Chancellor has, by *f.* 31., a discretionary power to make an order for that purpose upon petition of any creditors. But this must be done by an express order of the Lord Chancellor to vacate the former appointment and to make a new assignment. Th· inconvenience which may ensue from the assignee being abroad is no other than what may arise

(a) 2 *East*, 399.

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in every other case where a conveyance is necessary. 2dly, The sale of the ship by the defendant, not being tortious at the time and under the circumstances, is no conversion in law. There was a bonâ fide delivery of the ship from *Ward* the then owner to the defendant, and if *Ward* could not have maintained trespass, neither could he have maintained trover. The defendant had at least a rightful possession, though with a bad title. Then the assignees cannot convert that which was at first a lawful possession into a tortious one, without a demand and refusal. In 5 *Com. Dig.* 541. *Trespass* D. it is said, that "a man shall not be charged in trespass for goods which he had by the delivery of the party himself, except where by a wrongful act he makes himself a trespasser ab initio. So in *Weymouth* v. *Boyer* (*a*), *Buller* J., sitting for the Lord Chancellor, considered that trover would not lie against one in possession and making sale under the authority of the owner. And he said, that if it were no conversion at the time of the sale, no refusal afterwards would do. So where one gives an authority for doing a thing, he cannot for any subsequent cause punish that which is done by his own authority. 8 *Co.* 146. *b.* 3dly, The plaintiffs as assignees are bound to make title to the ship with all the formalities required by the register acts. They take the bankrupt's estate by the conveyance of the commissioners in the same manner as property is conveyed to any other. By stat. 13 *Eliz. c.* 7. persons purchasing copyhold from the commissioners must compound with the lord like any other purchasers. And in *Drury* v. *Man* (*b*) it was ruled, that assignees of bankrupts stood in the same relation to the lord of the copyhold as any other vendors. Besides, if such assignees

(*a*) 1 *Vef. jun.* 416. 424. (*b*) 1 *Atk.* 95.

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were not bound to take a conveyance of a ſhip under the regiſter acts like others, the policy of the law would be greatly defeated; for many aſſignees are foreigners, who would by the medium of a bankruptcy become owners of *Britiſh* ſhips. But 4thly and principally, the defendant has done every thing required by the regiſter laws to complete his title: and therefore the caſe of *Heath* v. *Hubbard* (*a*) proceeded on a miſtake of thoſe laws. The ſtat. 12 *Car.* 2. *c.* 18. does not provide for any caſe of transfer of ſhips. The ſtat. 7 & 8 *W.* 3. *c.* 22. is the firſt which regulates the transfer between individuals: and that requires (*ſ.* 21.) that "upon any transfer of property to *another* port" the ſhip ſhall be regiſtered *de novo*, and the former certificate delivered up to be cancelled; and that "upon any alteration of property in the *ſame* port, by the ſale of one or more ſhares in any ſhip after regiſtering thereof, *ſuch* ſale ſhall be acknowledged by indorſement on the certificate of the regiſter." By "*transfer of property to another port*" muſt be underſtood to ſome *perſon* reſiding at another port, by which the home of the ſhip would be changed (*b*); and in this caſe the direction is expreſs that the ſhip ſhall be regiſtered *de novo*, and that the certificate of the former regiſtry ſhall be cancelled, and therefore no indorſement can be made of it; but ſuch indorſement is to be and can only be made upon any alteration of property, by the ſale of one or more ſhares to perſons in the *ſame* port. The regulations were adopted to preſerve the evidence of the ownerſhip of *Britiſh* veſſels remaining in *Britiſh* ſubjects with the leaſt trouble, delay, and expence to individuals. It is evident in this ſtatute that the word SUCH (*i. e.* "ſuch ſale ſhall be acknowledged by indorſement on the cer-

(*a*) 4 *Eaſt*, 110. (*b*) Vide 26 *Geo.* 3. *c.* 60. *ſ.* 5.

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tificate of the regifter") is neceffarily confined to an alteration of property in the *fame* port. The 16th fect. of the 26 *Geo.* 3. *c.* 60. reciting that the provifions made in the laft-mentioned act, "touching the indorfement on certificates of regiftry, in cafe of any alteration of property in any fhip in the *fame* port to which fhe belongs have been found infufficient," directs further regulations to be complied with befides the indorfement thereby required. The fame words are again referred to in fect. 15 of the ftat. 34 *Geo.* 3. *c.* 68. which gives a form of the indorfement required to be made on the certificate of regiftry, in cafe of any alteration of property in the *fame* port to which the fhip belongs. Then the 16th fection of the laft act provides, "that if any fhip fhall be at fea, "or abfent from the port to which fhe belongs at the "time when *fuch* alteration in the property thereof fhall "be made as aforefaid, fo that an indorfement on (*a*) "the certificate cannot be immediately made, the fale, "&c. fhall notwithftanding be made by a bill of fale," &c. and a copy thereof fhall be delivered, and an entry thereof indorfed on the oath or affidavit, and a memorandum thereof be made in the book of regiftry, and notice given to the commiffioners of the cuftoms, &c. Now in commenting on the words of this laft claufe the Lord C. J. in the cafe of *Heath* v. *Hubbard*, confidered that the word *fuch* (fuch alteration in the property) meant the fame as *any* alteration. But it muft rather be taken to refer to *fuch* alteration as was mentioned in the preceding fection, to which it has evident relation;

(*a*) In the cafe of *Heath* v. *Hubbard*, 4 *Eaft*, 120. an error was noticed in the printed ftatute l. 3. of this claufe, "indorfement *or* certificate" for "indorfement *on the* certificate." And vide the Lord C. J.'s reading of it in page 128. *ib.*

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and the alteration there mentioned is an alteration of property in the *same* port, the same which was stated in the stat. 7 & 8 *W.* 3. which required an indorsement on the certificate of the former registry, and which is there plainly contradistinguished from a transfer of property to *another* port, which required a registering *de novo* and a delivery up of the old certificate to be cancelled. If the ship had been in her proper port at the time of the sale, the case could not have been at all affected by the 16th section, which is only applicable to transfers of property at sea or out of the proper port. Neither would it have fallen within the 15th section, because that is expressly confined to any alteration of property in the *same* port to which the ship belongs. And the 16th section only applies to the case of a ship absent from its own port, which, if at home at the time of the sale, would have fallen within the 15th section, and consequently cannot affect the present case, which is that of a *whole* ship transferred to *another* port, which at any rate requires a new register by the stat. 7 & 8 *W.* 3. *c.* 22. *s.* 21. And the stat. 34 *Geo.* 3. *c.* 68. *s.* 20, 21, and 22. confirms the distinction of the two modes of transfer, and extends the authority of the officers in certain cases to give new registers, even in the case of partial transfers in the same port. Then if this distinction be well founded, and this is a case where no indorsement of any certificate was necessary to convey the title from the vendor, but only a subsequent new registration, which is the act of the vendee himself, and merely calculated to give him the privileges of the *British* navigation, the case of *Moss* v. *Charnock* (*a*) does not apply, where a further act remained

(*a*) 2 *East*, 399.

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to be done by the bankrupt after his bankruptcy, in order to complete the title.

Hall, in reply to the firſt objection to the plaintiff's action, as to the not joining the removed aſſignee, becauſe the Ld. Chancellor had not purſued the 31ſt ſection of the ſtat. 5 *Geo.* 2. *c.* 30. by vacating the former and appointing a new aſſignment to be made, obſerved, that the power at firſt given to the Lord Chancellor, was general, "to make ſuch order as he ſhould think juſt and reaſonable:" and then the clauſe proceeds to ſtate, that "*in caſe* a new aſſignment ſhall be ordered to be made," the bankrupt's eſtate "ſhall be effectually and legally veſted in ſuch new aſſignee," &c. which aſſumes that a new aſſignment is not neceſſary at all events to be made. And here it was not neceſſary, becauſe there were other aſſignees remaining in whom the whole legal eſtate was already veſted when *Johnſtone* was removed. To the ſecond objection he anſwered, that however rightful a bare poſſeſſion might have been at firſt, and until a demand and refuſal, at any rate the defendant's taking upon himſelf to make ſale of the ſhip without title was an actual converſion. As to the third objection, it was before anſwered. As to the fourth, which went to the defendant's title, the preliminary objection grounded on the caſe of *Moſs* v. *Charnock* remains unanſwered; for the due regiſtering of the ſhip was as neceſſary to complete the title to her, whether to be done by the vendor or vendee, as the bill of ſale. And the only diſtinction taken in the caſe of *Heath* v. *Hubbard* was between ſuch acts as were neceſſary to be done by either of the parties, and ſuch as were to be done by the officers or third perſons, which latter alone were conſidered as *directory*, and not affecting the title.

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And here the ſhip was not regiſtered de novo (even if that would otherwiſe have done) till after the bankruptcy; and the bill of ſale alone could not give the title. But in no inſtance now can a regiſter de novo be granted without ſhewing a compliance with all the requiſites of the 15th and 16th ſections of the ſtat. 34 *Geo.* 3. *c.* 68. For the 20th ſection enacts, that when the property in any veſſel ſhall be transferred to any other ſubject in *whole* or in *part*, and ſuch veſſel ſhall be required to be regiſtered de novo, the proper officer ſhall require the bill of ſale to be produced to him, &c. "Provided that all the *other* regulations required by the laws in force concerning the regiſtry *de novo* of veſſels be complied with." This preſumes that there are other regulations beſides the production of the bill of ſale, and theſe are only to be found in the 15th and 16th ſections.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered judgment. There were three objections taken in this caſe to the plaintiffs' right to recover, founded on a ſuppoſed defect in the *title of the plaintiffs* to the ſhip in queſtion. The firſt objection was, that *John Glen Johnſtone*, *one* of the *aſſignees*, (in reſpect to whom the Chancellor's order for removing him from being an aſſignee is within ſtated,) ought, notwithſtanding ſuch order, to have been joined as a plaintiff, inaſmuch as his intereſt as aſſignee was not diveſted by the mere operation of ſuch order; but that a new aſſignment by the old to the new aſſignees, whereby the debts, effects, and eſtate of the bankrupt ſhould be "effectually and legally veſted in ſuch new aſſignees," was neceſſary for this purpoſe. A ſecond was, that there

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was *no conversion* of the ship in this case proved to have been committed by the defendant. The third objection was, that the plaintiffs, as assignees, ought to have derived a title to themselves, by shewing a compliance with all such forms as are required by the several statutes on the subject, to give effect to transfers of property in ships in other cases. Supposing however the plaintiffs' right to recover not to be defeated on any of these grounds, it was then further insisted, on the part of the defendant, that *the defendant himself* had a good *right* to the ship in question, in virtue of his purchase, and the registration of the ship de novo in the port of *London*, as stated in the case.

As to the first of these objections, assuming it to be well founded, and we think it so, it has only the effect of precluding the plaintiffs, who are *three* out of the *four* assignees in whom the property of the ship originally was (and until a new assignment is made under the order of the Lord Chancellor, continues to be) vested, from recovering more than their three-fourth parts in value of the property in question. For it is now too well settled to be any longer disputed in a court of law, that the defendant can only avail himself of an objection of this sort, viz. *that all the several part owners in a chattel have not joined in an action of trespass, or of tort brought in respect to it, by plea in abatement.* I will only refer to *Addison* v. *Overend*, 6 *Term Rep.* 766, in which most of the cases on the subject are collected; and *Sedgworth* v. *Overend*, 7 *Term Rep.* 279.

As to the second objection, viz. that there is no proof of any *conversion* by the defendants of the ship in question; if in the result it shall appear that *the defendant had no title to the ship in question* at the time when he sold her

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by public auction on the 19th of *February* 1802, and afterwards, on the 5th of *April* 1802, assigned her to persons who sent her to sea, where she was lost, it will in that case be very difficult to state an instance of an actual conversion to their own use more absolute and perfect on the part of the defendant than this. And though *Ward* could not, as the defendant's counsel said, have complained of the sale by *Hubbard* as a tortious act, it does not follow from thence that his assignees cannot. *Ward* could not have maintained trover for the ship against *Hubbard* while in his possession; but the plaintiffs, his assignees, most unquestionably might have brought such action if the property in the ship passed to them under the commission. It is by no means true, as a general proposition, that the assignees can maintain no other actions than what might have been maintained by their bankrupt. A bankrupt cannot recover the value of goods he had delivered in pursuance of a purpose of fraudulent preference in contemplation of bankruptcy, which his assignees may, and in daily practice constantly do. And many other instances to the same effect might be put.

As to the third objection, that the plaintiffs as assignees ought to have derived title to themselves by a compliance with the requisites of the statutes 26 *Geo.* 3. and 34 *Geo.* 3. (called Lord *Liverpool*'s Acts) in respect to the transfer of property in ships; it is an objection which, if it could prevail, would have the effect of defeating every title that has been hitherto made under a commission of bankrupt to this species of property since the passing of those statutes. For I believe that in no instance the requisites of those statutes will be found to have been complied with in regard to assignments by commissioners of bankrupt.

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But there is no ground for this objection. These statutes only relate to transfers made by the act of the parties, viz. from a *former owner* to a new *owner*, and where the transfer is capable of being effectuated in the ordinary way by the mere operation of an instrument of assignment from the one party to the other, and do not relate to transfers deriving their effect by peculiar provision or operation of law, as assignments by commissioners of bankrupt to assignees under the bankrupt laws do. There the commissioners are not *former owners*; they do not *sell* in the sense in which the word *sale* is used in these statutes 26 and 34 *Geo.* 3.; although in pursuance of the directions of the stat. 13 *Eliz. c.* 7. *s.* 2. and other later statutes, they *make sale thereof* in point of form by deed indented and inrolled, &c. as being the means specially appointed and described by the latter of those statutes for the execution of the *power* given to the commissioners in this respect, for the vesting of such property of the bankrupt in his assignees accordingly. The form of indorsement on change of property in the 15th section of the stat. 34 *Geo.* 3. *c.* 68. clearly shews that the *sale* therein meant was a *sale* from a *former proprietor*. It runs thus: "Be it remembered, that [*I* or *we*] [names, residence, and occupation, of the *persons selling*] have this day sold and transferred all [*my* or *our*] right, share, or interest, in and to the ship or vessel," &c. But how can commissioners of bankrupt possibly be considered as persons selling any *right, share, or interest of their own* within the meaning of these words [*my* or *our*]? The property transferred by them is neither legally nor equitably *theirs*: it does not vest in them for an instant: it passes *by* them, or rather by the act they are directed and empowered to perform, and not *through* them. It appears

pears therefore to us that the aſſignments made by commiſſioners of bankrupt to the aſſignees of a bankrupt were not meant by the legiſlature to be comprehended in the proviſions directed to be purſued in reſpect to the transfer of property in ſhips between ſellers and buyers; and that of courſe the aſſignment in this caſe is not liable to the objection which has been made on this ground. If indeed this objection were allowed, it would alſo defeat the object of proviſional aſſignments, ſo far as reſpects a bankrupt's ſhip, and the crown's extent would conſtantly have the preference.

Suppoſing therefore that the title of the plaintiffs to recover in this action is not affected by any of theſe three objections, it remains to be conſidered whether the defendant has upon the face of this caſe a good title to the ſhip in queſtion, in virtue of his purchaſe and the ſubſequent regiſtration de novo above ſtated? And this depends upon the proviſions contained in the ſtatutes 7 & 8 *W.* 3. *c.* 22.; 26 *G.* 3. *c.* 60.; and 34 *G.* 3. *c.* 68. as far as they reſpect the transfer of the entire property in a ſhip, and particularly upon the application of the proviſions contained in the 16th ſection of the ſtat. 34 *G.* 3. *c.* 68. to the caſe of a transfer of the entire property in a veſſel *when at ſea* or *abſent from the port to which ſhe belongs*, as this ſhip was at the time when the aſſignment of it was made to the defendant. And firſt, the ſtat. 7 & 8 *W.* 3. *c.* 22. *ſ.* 21. provides, that no ſhip's name ſhall be changed without *regiſtering ſuch ſhip de novo*, which is required to be done *upon transfer of property to* ANOTHER *port*, and delivering up the former certificate to be cancelled. And in caſe there be any alteration of property *in the ſame port* by the ſale of *one or more ſhares* in any ſhip after regiſtering thereof, *ſuch* ſale ſhall always

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be acknowledged by *indorsement* of the certificate of registry before two witnesses, in order to prove that the *entire* property in such ship remains to some of the subjects of *England*. It is to be observed, that here is no provision in case of sale of the ship *at the same port*, for proving it to continue *English* property, if an indorsement on the certificate be only to be made in the case of a *partial* sale; for a new register is not required but on a transfer to *another port*. The stat. 26 *G.* 3. *c.* 60. *s.* 3. reciting that it is expedient that the provisions made in the stat. 7 & 8th of King *William* should *be altered and amended*, and that the same should be extended and applied to ships other than those therein described, enacts what ships shall be registered. And by *s.* 4. directs that no registry shall be made but *at the port to which such ship or vessel properly belongs*. And *s.* 5. enacts that the *port, to which any ship or vessel shall thereafter be deemed to belong* within the meaning of that act, shall be the port from and to which such ship *shall usually trade*, or being a *new* ship shall *intend* to trade, and at or near which the husband or acting manager, or owner, usually resides. The 16th section, reciting, that the provisions made in and by the said recited act touching the indorsements on certificates of registry, in case of ANY *alteration of property in any ship or vessel in the same port, to which the ship or vessel belongs*, have been found insufficient, enacts that in every *such* case, besides the indorsement required by the said recited act, there shall also be indorsed on the certificate of registry before two witnesses, the town, place, or parish, where all and every person or persons *to whom* THE PROPERTY *in any ship or vessel, or any part thereof*, shall be *so transferred*, shall reside, &c.; and the person, to whom *the property* of such ship or vessel shall be so transferred,

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ſhall deliver a copy of ſuch indorſement to the perſons authoriſed to make regiſtry, and who are to make an entry thereof to be indorſed on the oath or affidavit upon which the original certificate of regiſtry was obtained, and to make a memorandum in the book of regiſters, and give notice to the commiſſioners of the cuſtoms. This clauſe ſpeaks of transfer of the property in *the ſhip or any part thereof*; either conſidering the proviſions for indorſement made by the ſtatute of King *William* as extending to a transfer of *the whole*, or meaning to remedy the defect in their not being already ſo extenſive. It is either a *legiſlative expoſition* of the ſtatute of King *William*, or an *enlargement* of it. The ſtat. 34 *G.* 3. *c.* 68. *ſ.* 15., reciting, that by the laws now in force upon *any* alteration of property in any ſhip or veſſel in the ſame port to which ſuch ſhip or veſſel belongs, an *indorſement* upon the certificate of regiſtry is required to be made, enacts that ſuch indorſement ſhall be made by the perſon "*transferring* THE PROPERTY *of the ſhip or veſſel*," &c. and preſcribes the form. This clauſe alſo conſiders the indorſement neceſſary upon *any* alteration of property, and does not ſpeak of the perſon ſelling *one or more ſhares in the veſſel*, but of perſons "*transferring the* PROPERTY *of the ſhip*." And this act is in furtherance of the proviſions of the ſtat. 26 *G.* 3. It is to be obſerved alſo, that the expreſſion in the ſtatute, of an alteration of property taking place *in the port* to which the ſhip belongs, means *when the ſhip is in the port* at the time the change of property takes place; in which caſe ſuch change is to be indorſed on the certificate of regiſtry; and is put in oppoſition to the caſe of the ſhip being *abſent from the port*, or *at ſea* (which is the object of the 16th ſection of this act), in which caſe the certificate being with the ſhip, the change

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change of property cannot be indorsed thereon, and is therefore directed to be noticed on the oath and in the book of registers. The 16th section, as already observed, provides for the case of the absence of the ship from the port to which she belongs at the time when *such alteration* in the property thereof shall be made as aforesaid. *That alteration*, by reference to the preceding section, is *any alteration*, and, by referring again to the 16th section of the stat. 26 *G.* 3. is *any alteration by which the property in any ship* or *any parts* thereof may be *transferred*. If these provisions be to be construed as being confined and limited to the transfer only of *shares and parts* of ships, this mischief might follow, viz. that the whole of the ship might by bill of sale be transferred to a *foreigner*, and if she did not change her port, the vessel might still trade with all the advantages of a *British* ship. But no such thing can happen, if the certificate of the registry be indorsed, as that must be shewn to the officers of the customs when required. And what reason can there be, if a ship be at sea, and *any shares* be sold, that the provisions of the 16th section of the stat. 34 *G.* 3. should be complied with; but not, if the *whole* be sold? For according to that construction, at least until the return of the ship, all the mischiefs intended to be prevented by the 16th section as to the transfer of *parts* of the ship would subsist as to the *whole* ship, if transferred when at sea. In *M'Neil's* case in *Reeves' History of Shipping*, p. 504. Lord *Camden*, president of the council, said, that he thought the stat. 26 *G.* 3. was an act which in every view of it should be considered as a *remedial* act; it was to prevent a public mischief; *to amend and alter* the stat. 7 & 8 *W.* 3. It had appeared that frauds without number were committed under that act; and that was stated

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to be the reafon of making the ftat. 26 *G.* 3. The rule therefore of conftruction in applying and explaining the act fhould be fuch as will moft aid the advancing the means of relief and in fuppreffion of fraud. And adopting this rule of conftruction, and collecting the intention of the legiflature as well as we are able from thefe feveral acts of Parliament, we feel ourfelves obliged to confider the provifion contained in the 16th fection of the ftat. 34 *G.* 3. *c.* 68. as to the alteration of property "in a fhip or veffel *at fea*, or *abfent from the port* to which fhe belongs," as applying to *any* alteration of property in the fhip or veffel, whether the fame be made by the transfer of the *whole* or by the fale of *any fhare* or *number of fhares* therein, amounting to lefs than the whole intereft in fuch fhip or veffel. And as fuch provifions have not been purfued in refpect to the affignment of this fhip made on the 9th of *November* 1801, when it is ftated to have been *at fea*, we think that no intereft therein has paffed to the defendant by his purchafe and regiftration *de novo* ftated in the cafe; and that confequently the plaintiffs are entitled to retain the benefit of the verdict found for them to the extent of 1744*l.* 15*s.* and cofts, being three-fourth parts of the fum of 2326*l.* 6*s.* 8*d.* mentioned in the cafe as the damages found for the whole fhip; and the verdict being thus altered, we direct that judgment be entered for the plaintiffs accordingly.

Poftea to the plaintiffs.

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Tuesday, June 19th.

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A carrier by water contracting to carry goods for hire *impliedly* promises that the vessel shall be tight and fit for the purpose, and is answerable for damage arising from leakage. And this, tho' he had given notice "that he would not be answerable for *any* damage *unless* occasioned by want of ordinary care in the master or crew of the vessel, in which case he would pay 10*l.* per cent. upon such damage, so as the whole did not exceed the value of the vessel and freight." For a loss happening by the personal default of the carrier himself (such as the not providing a sufficient vessel) is not within the scope of such notice, which was meant to exempt the carrier from losses by accident or chance, &c; even if it were competent to a common carrier to exempt himself by a special acceptance from the responsibility cast upon him by the common law for a reasonable reward to make good all losses not arising from the act of God, or the king's enemies.

THIS was an action of assumpsit, brought to recover the amount of damage done to a quantity of yarn of the plaintiffs, delivered on board a lighter of the defendant's, to be carried therein from a quay at *Hull* to a sloop of one *William Barton* lying in a dock there, and to be delivered on board the same, for a reasonable reward to be paid to the defendant. The declaration stated (amongst others) a promise by the defendant that the lighter *was tight and capable of carrying the yarn;* also a promise by him that the lighter was so far as he knew *a proper and substantial vessel fit for carrying the yarn without damage;* and also a promise by him *to stow, load, and carry the yarn carefully*, and with due attention to the same. Plea non assumpsit. On the trial before *Thomson* B. at the last *York* assizes, a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case:

On the 10th of *June* 1802 several bales of yarn belonging to the plaintiffs were delivered on board the lighter, of which the defendant was the owner, in manner, and for the purpose above mentioned. The defendant kept sloops for carrying other persons' goods for hire, and also lighters for the purpose of carrying these goods to and from his sloops; and when he had not employment for his lighters for his own business, he let them for hire to such persons as wanted to carry goods to other sloops. Previous to the delivery the master of the defendant's lighter, when he was applied to to fetch

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the yarn, undertook to bring it in the lighter to the ſloop; and being aſked if the lighter were fit to carry it, ſaid, *it was very fit and tight*, and that he had been down the day before with hemp and flax in her to ſome of their veſſels at *South End*. In carrying the yarn in the lighter to the ſloop the lighter leaked, and ſome of the bales of yarn were thereby wetted and damaged; and on the arrival of the lighter at the ſloop the maſter of the lighter, on its being mentioned to him that he had got water in his boat, ſaid, there was a bit of a weep (meaning a leak) abaft. Three or four of the bales of yarn were ſtowed upon the top of the pump, by which it was rendered entirely uſeleſs until they were removed. Before the ſecond bale of yarn could be hoiſted into the ſloop the lighter was going down, and would have ſunk to the bottom of the dock with the reſt of the bales, but was prevented by getting tackle fixed to her to get her up. The damage thereby done to the yarn amounted to 274*l.* 16*s.* 4*d.* The lighter was *not tight and ſufficient for the carriage of the yarn*, but was *leaky*: and the *maſter* of the lighter was guilty of *negligence* in not ſtowing the yarn properly. Previous to the ſhipping of the yarn on board the lighter the defendant publiſhed the following notice, of which the perſon who ſo ſhipped the yarn on behalf of the plaintiffs had notice, he himſelf being one of the perſons who ſigned the ſame. "Navigation of the "River *Humber* and of the rivers falling into the ſame. "To all merchants, tradeſmen, and others. We whoſe "names are hereunto ſubſcribed (by ourſelves or by our "reſpective agents) do hereby ſeverally give notice, that "we will not be anſwerable for *any* loſs or damage which "ſhall happen to any cargo which ſhall be put on board "any of our veſſels, unleſs ſuch loſs or damage ſhall

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" happen or be occaſioned by want of ordinary care and " diligence in the maſter or crew of the veſſel; when " and in ſuch caſe we will pay to the ſufferers 10*l.* per " centum upon ſuch loſs or damage, ſo as the whole " amount of ſuch payment ſhall not exceed the value of " the veſſel on board whereof ſuch loſs or damage ſhall " have happened, and the freight of ſuch veſſel. And " we do hereby give this further notice, that any mer- " chant or other perſon deſirous of having their goods " or merchandize carried *free of any riſk* in reſpect of " loſs or damage, whether the ſame ſhall happen from " the act of God or *otherwiſe*, may have the ſame ſo " carried by entering into an agreement for the payment " of an *extra freight, proportionable* to the accepted reſpon- " ſibility, on application to us or our reſpective agents. " *Hull*, *October* 1, 1800." This notice was ſigned by the defendant and by 49 other owners of veſſels at *Hull*. The queſtion for the opinion of the Court was, Whether the plaintiffs were entitled to more than 10*l.* per cent. upon the above damages? If they were ſo entitled, the verdict was to be entered for the plaintiffs for the above ſum of 274*l.* 16*s.* 4*d.*; if they were not ſo entitled, then the verdict was to be entered for the plaintiffs for the amount of 10*l.* per cent. upon the damages.

Holroyd for the plaintiff, after premiſing that the whole facts of the caſe, and even the terms of the notice, ſhewed that the defendant was a common carrier, contended that in that character he was anſwerable by law for every loſs except by the act of God or the king's enemies, and that he could not diſcharge himſelf from ſuch reſponſibility by any notice. Beſides which every maſter is liable for the actual negligence or miſconduct of his ſervant acting

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within the ſcope of his employment, of which liability he cannot by any general notice diveſt himſelf. The common law attaches upon carriers by water as well as by land from one part of the kingdom to another, and their general reſponſibility is founded on public policy which it is the object of the notice in queſtion to contravene. In *Kirkman* v. *Shawcroſs* (*a*), Lord *Kenyon* conſidered that innkeepers and common carriers could not get rid of their legal reſponſibility, the one for the ſafe cuſtody of the goods of their gueſts, the other for ſafe carriage, though the latter might ſtipulate for a ſpecial reward adequate to the riſk. That opinion was approved in *Oppenheim* v. *Ruſſell* (*b*). And the diſtinction was more expreſsly taken by Lord *Kenyon* in *Hide* v. *The Proprietors of the Trent and Merſey Navigation* (*c*), between where a man is chargeable by law generally, as in the caſe of a common carrier, and where on his own contract: in the former he is liable for all loſſes, except thoſe ariſing from the act of God or of the king's enemies, and cannot, ſays his Lordſhip, diſcharge himſelf from them by any act of his own, as by giving notice to that effect. So ſaid Lord *Holt* in *Lane* v. *Sir R. Cotton* (*d*), though erroneouſly applied to the caſe of a poſtmaſter. There is no need of a contract, for the law makes him anſwerable. He has a reward; which is the reaſon in the caſe of innkeepers, *hoymen*, &c. who are bound to keep ſafely and anſwer all neglects of thoſe who act under them, *though they ſhould expreſsly caution againſt it.* Now here the notice is not that the carrier will not be liable without a certain adequate price for his riſk, which would admit of a different conſideration, but that he will not be liable at all where

(*a*) 6 *Term Rep.* 17. (*b*) 3 *Boſ. & Pull.* 42.
(*c*) 1 *Eſp. N. P. Caſ.* 36. (*d*) 1 *Salk.* 18. 12 *Mod.* 481—3. S. C.

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the loss does not happen from want of care of the master and crew, nor even then for above so much per cent. But no person can exempt himself from a common law obligation, without at least some consideration moving to the person to whom he is liable; such, perhaps, as his agreeing to carry for less than the usual reasonable price, (as is the common case where parcels are of less than 5*l.* value, or paid for accordingly); otherwise it is nudum pactum. If indeed a carrier charge more than reasonable rates he may be indicted for extortion. Here there is no consideration for the exception; and therefore the common law liability attaches upon a carrier for losses by the want of care of those whom he employs in his business, which is the same as his own. For qui facit per alium facit per se. And this liability sometimes extends to charge him even criminally. As where a bricklayer's servant leaves the rubbish of his work in the street, the master is indictable for the nusance. Or where a bookseller or printer's servant sells a libel in his shop, that will charge the master for the libel. In all cases where a person engages to do a thing for a reward the law implies an engagement to do it with reasonable care and diligence; and it is contradictory to the very nature of the engagement and the policy of the law to introduce such an exception as in this case. At all events however the loss in this case is out of the terms of the notice; for it did not happen from the want of care of the master or crew, but from the personal default of the carrier himself in not having provided a sufficient vessel, which it was his duty to have done: and there is no stipulation against his own personal wrong. And he referred to *Ellis* v. *Turner* (*a*), where a similar notice was given, and

(*a*) 8 *Term Rep.* 531.

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yet the owner of the veſſel was holden liable for the whole loſs upon the ſpecial undertaking of the maſter.

Gaſelee, for the defendant, ſaid, that he was reſtrained by the order of niſi prius from diſputing that the defendant was liable to the extent of 10 per cent. otherwiſe he ſhould have contended that he was not liable at all. He admitted that in the abſence of any expreſs contract the law implies a contract that the carrier ſhall be liable for all loſſes, except ſuch as ariſe from the act of God or the king's enemies; but inſiſted that he might make a ſpecial acceptance, on which only he would then be liable. For expreſſum facit ceſſare tacitum, and the law never raiſes an implied contract againſt an expreſs one; as in *Touſſaint* v. *Martinnant* (a). The dictum of Lord *Holt* in *Lane* v. *Cotton* may indeed be oppoſed to this, but that ſtands unſupported, and is contrary to the principle of the modern deciſions eſtabliſhing the ſpecial acceptance of carriers in certain caſes, as well as of ſome more ancient authorities. *Kenrig* v. *Eggleſton* (b); *Tyly* v. *Morrice* (c); *Titchburne* v. *White* (d); *Gibbon* v. *Paynton* (e); *Clay* v. *Willan* (f); *Yate* v. *Willan* (g); and *Izett* v. *Mountain* (h). The dictum of Lord *Kenyon* in *Hide* v. *The Trent and Merſey Navigation* (i) does not go the length of ſaying that a common carrier cannot accept goods upon a ſpecial contract, but only that he cannot diſcharge himſelf by *his own* act, as by giving general notice. And it is no anſwer to the 5*l.* caſes to ſay, that they pro-

(a) 2 *Term Rep.* 100. (b) *All.* 93. (c) *Carth.* 485.
(d) 1 *Stra.* 145. (e) 4 *Burr.* 2298. (f) 1 *H. Blac.* 298.
(g) 2 *Eaſt*, 128.
(h) 4 *Eaſt*, 371. The account of the caſe of *Smith* v. *Shepherd*, *Abbott's Law of Merchant Shipping*, 232. was alſo referred to.
(i) 1 *Eſp. N. P. Caſ.* 36.

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ceeded on an undertaking of the owner, exprefs or implied, that the parcel was not worth more than 5*l.*; for it is now fettled that he fhall not recover even the 5*l.* in cafe of fuch a fpecial acceptance, if the parcel be of greater value. Taking the whole of the notice together, it appears that fo far from the carrier declining the refponfibility of the law, he was even willing to take more onus upon him, and indemnify the owner againft even the acts of God and the king's enemies for a *proportionable* reward. Then it muft be inferred that the fpecial rifks, for which only the carrier contracted in the firft part of the notice, were for lefs than a reafonable reward; and if fo, there would be a fufficient confideration to the plaintiff for the defendant narrowing his common law liability. As to this not being a cafe within the terms of the notice, becaufe it is the owner's duty to provide a proper veffel; that does not follow; becaufe the want of repair may be as much the default of the mafter as of the owner. Befides the notice is that the owner will not be liable for *any* lofs unlefs occafioned by the want of ordinary care in the mafter or crew, which excludes every other caufe of lofs. Then it was not competent to the fervant beyond the declared fcope of his authority, as limited by the notice, to bind the owner of the veffel by a promife which went to warrant the fecurity of the veffel at all events; however the owner himfelf might have bound himfelf by fuch a promife: and therefore this is not like *Ellis* v. *Turner*, where the fpecial promife of the mafter was collateral to the notice, namely, to deliver the goods at a particular place in the courfe of the navigation. [Lord *Ellenborough* C. J. Is it not within the fcope of the fervant's general authority to declare in what condition the veffel is, which may be the plaintiff's induce-

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inducement to put his goods on board it?] If the fervant make a fraudulent reprefentation he himfelf would be liable, and might perhaps, in fome cafes, bind his employer for whofe benefit he was acting, but the remedy would be in another form of action. [*Lawrence* J. If the fervant have authority to reprefent the veffel in good condition, why may not that be the foundation of an affumpfit as well as if the mafter himfelf had fo reprefented it?] It would be fo if he had a general authority, according to *Seignior* v. *Wolmer* (*a*); but here was only a fpecial authority to contract within the terms of the notice, and therefore an execution of it under a different modification will not bind the principal, as in *Fenn* v. *Harrifon* (*b*). If then the plaintiff muft be bound by the notice, this action is mifconceived; becaufe the defendant did not contract as a common carrier, but fpecially with the reftriction contained in the notice; and if he were bound to have accepted the goods in his general character, he having refufed to do fo, the plaintiff's remedy fhould have been by an action on the cafe againft him for fuch refufal.

Holroyd, in reply, noticed the ftatutes 7 *Geo.* 2. *c.* 15. and 26 *Geo.* 3. *c.* 86. which particularly exempted the owners of fhips from loffes of gold, filver, and jewels, put on board without their privity, beyond the value of fhip and freight, and that on certain conditions: which fhews that they were before confidered as liable. And faid that the 5*l.* cafes certainly went on the ground of want of adequate confideration for the rifk: and it was a fufficient reafon why the carrier was not liable even to that amount, becaufe if he had had notice that the value of the goods

(*a*) *Godb.* 360. (*b*) 3 *Term Rep.* 757. Sed vi. S. C. 4 *Term Rep.* 177.

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was more, he might have taken additional precautions against the loss. That as to the form of the action, it was settled in *Dale* v. *Hall* (a) that it made no difference whether it were in assumpsit or on the custom of the realm; for that by stating that the defendant carried for hire, it shewed that he was a common carrier, and that was a foundation for the assumpsit.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. delivered judgment. The general question submitted to our determination by the special case stated at nisi prius is, whether the plaintiffs be intitled to more than 10*l.* per cent. upon the sum of 274*l.* 16*s.* 4*d.* the damages stated to have been sustained by the plaintiffs in consequence of the injury done to their yarn while on board the defendant's lighter. That they are entitled to recover to the extent of 10*l.* per cent. is admitted by the terms of the question. On the part of the plaintiffs it has been argued, either that the notice given by the defendant, as set forth in the case, is illegal, being to exempt him from a responsibility cast on him *by law* as a carrier of goods by water for hire; or if that proposition be not maintainable, that in fact the present case does not fall within the terms and meaning of that notice. At the close of the argument the Court intimated an opinion that in the determination of this case it might perhaps not be necessary to enter into a consideration of the general question, as to the validity of these notices in point of law, and to what extent and upon what principles they may be supportable. And on further consideration we are all of opinion, that in the present case, admitting the notice given by the defendant

(a) 1 *Wils.* 281.

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and the other owners of veſſels to be valid as an agreement between them and the ſhippers of goods, the circumſtances ſtated do not bring the plaintiff's loſs within ſuch agreement. In every contract for the carriage of goods between a perſon holding himſelf forth as the owner of a lighter or veſſel ready to carry goods for hire, and the perſon putting goods on board or employing his veſſel or lighter for that purpoſe, it is a term of the contract on the part of the carrier or lighterman, *implied by law*, that his veſſel is tight and fit for the purpoſe or employment for which he offers and holds it forth to the public: it is the very foundation and immediate ſubſtratum of the contract that it is ſo: the law preſumes a promiſe to that effect on the part of the carrier without any actual proof; and every reaſon of ſound policy and public convenience requires it ſhould be ſo. The declaration here ſtates ſuch promiſe to have been made by the defendant; and it is proved by proving the nature of his employment; or, in other words, *the law* in ſuch caſe without proof *implies* it. The declaration avers a breach that the lighter was *not tight and capable* of carrying the yarn ſafely; and the facts ſtated ſupport the breach ſo alleged, by ſhewing that the veſſel was leaky and had nearly ſunk in the dock before the yarn could be unloaded from the lighter into the ſloop. This we conſider as perſonal neglect of the *owner*, or more properly as a non-performance on *his* part of what he had undertaken to do, viz. to provide a fit veſſel for the purpoſe. This brings me to conſider the terms of the notice: "We will "not be anſwerable for any loſs or damage which ſhall "happen to any cargo which ſhall be put on board any "of our veſſels, unleſs ſuch loſs or damage ſhall happen "or be occaſioned by want of ordinary care and diligence

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"in the master or crew of the vessel, in which case we "will pay 10*l.* per cent. upon such loss or damage; so "as the whole amount of such payment shall not exceed "the value of the vessel and the freight." I have before stated our opinion to be that this is clearly a neglect or breach of performance in the *owner* of the vessel, and not a neglect in the *master* or *crew;* it does not therefore come within the exception of such loss or damage as is to be compensated by 10*l.* per cent. But the notice states that "they will not be answerable for any *other* loss or damage;" and therefore this must be contended to be within that *other loss or damage* for which they will not be answerable; a proposition however which seems to have struck the counsel for the defendant as not capable of being supported; for I take him to have admitted in his argument that if the *defendant* had *himself* made the promise stated in the declaration he would have been liable; and he could not contend otherwise: for it is impossible without outraging common sense so to construe this notice as to make the owners of vessels say, We will be answerable to the extent of 10 per cent. for any loss occasioned by the want of care of the *master* or *crew*, but we will not be answerable at all for any loss occasioned by *our own misconduct*, be it ever so gross and injurious; for this would in effect be saying, We will be at liberty to receive your goods on board a vessel, however leaky, however unfit and incapable of carrying them; we will not be bound even to provide a crew equal to the navigation of her; and if through these defaults on our part she be lost, we will pay nothing. Nay more, your compensation in case of misconduct of the master or crew can never exceed the value of the vessel and her freight; and therefore by providing a rotten and leaky

veſſel of little value we leſſen our own reſponſibility pro tanto even in the only event in which we are to be at all reſponſible. Ridiculous as this ſuppoſed ſtate of the agreement muſt appear, yet theſe and more abſurd ſtipulations muſt be introduced into it if we give it a conſtruction which ſhall bring this caſe within it. Indeed that this is the true conſtruction will further appear from the part of the notice reſpecting *additional freight;* for it is addreſſed to thoſe who are deſirous of having their goods carried free of riſk "from the act of God or otherwiſe;" words importing that the thing for which an increaſed freight is to be paid, is that which is properly the object of riſk, and of courſe may or may not happen to the goods, *i. e.* that which may ariſe from accident and depends on chance, and not that which is certain and muſt inevitably be the conſequence of a defect in that which the carrier has engaged to provide. Every agreement muſt be conſtrued with reference to the ſubject matter; and looking at the parties to this *agreement* (for ſo I denominate *the notice)*, and the ſituation in which they ſtood in point of law to each other, it is clear beyond a doubt that the only object of the owners of lighters was to limit their reſponſibility in thoſe caſes only where *the law* would otherwiſe have made them anſwer for the neglect of *others*, and for *accidents* which it might not be within the ſcope of ordinary care and caution to provide againſt. For theſe reaſons, we are of opinion that the plaintiffs are entitled to have their verdict entered for the full ſum of 274*l.* 16*s.* 4*d.* and that the poſtea be delivered to them for that purpoſe.

Poſtea to the plaintiff.

1804.

Wednesday, June 20th.

WIGLEY *against* JONES, Marshal of the Marshalsea.

In an action against the marshal for an escape, it being alleged in the declaration that the prisoner was arrested on mesne process and brought before a Judge at chambers by virtue of a *writ of habeas corpus*, and was by him thereupon *committed* to the custody of the marshal *as by the record thereof now remaining in the Court of B. R.* appears, &c. such allegation is either impertinent and surplusage; for, properly speaking, such documents are not *records* nor capable of becoming so: or, considering them as *quasi of record*, the allegation is sufficiently proved by the production of them from the office of the clerk of the papers of the K. B. prison, with whom they are properly deposited.

IN an action against the marshal of *B. R.* for an escape the declaration stated that one *Mary Bergeret de Frouville* was indebted to the plaintiff in 34*l.* 9*s.* for goods sold and delivered, for the recovery of which the plaintiff in *Trinity* term 41 *Geo.* 3. sued out of *B. R.* a bill of *Middlesex* to arrest her, founded on an affidavit of debt for 34*l.* 9*s.* filed of record in *B. R.*, and which precept was indorsed for bail for the said sum. By virtue of which said precept the said *M. B. de F.* on the 23d of *September*, &c. was arrested by the sheriff of *Middlesex*, and detained in custody for want of bail; and being in such custody for the cause aforesaid, on the 24th of the same *September* she was brought before Sir *S. Le Blanc*, one of the Justices of *B. R.* at his chambers, &c. in the custody of the said sheriff by virtue of a writ of *habeas corpus* issued out of *B. R.* and directed to the sheriff, &c. and the said *M. B. de F.* was thereupon *committed* by the said Judge to the custody of the marshal of the Marshalsea, &c. at the suit of the plaintiff in the plea aforesaid, and for the cause aforesaid, there to remain until, &c. *as by the record thereof now remaining in the court of our said lord the king before the king himself manifestly appears*, by which commitment the defendant, then marshal, &c. took the said *M. B. de F.* into his custody, &c. in the King's Bench prison. The declaration then alleged the subsequent escape of the prisoner, while the debt remained unsatisfied, to the damage of the plaintiff, &c. Plea not guilty.

The only question at the trial was, Whether the averment of the writ of habeas corpus and the commitment

thereon

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WIGLEY *against* JONES.

thereon *appearing of record* were proved? the only proof being the production of the original writ itself (*a*) with the committitur annexed, which were produced by the clerk of the papers of the King's Bench prison, with whom, as the servant of the marshal, such documents are and have been for a considerable period past deposited. It was objected on the part of the defendant that these documents were not *records*, and that nothing else would satisfy the averment than shewing that they had been duly recorded *in court*, which could only appear by the production of such a record filed in the court, or an examined copy of it. And the case of *Turner* v. *Eyles* (*b*) was relied on as in point, where the Court held that evidence like the present was not sufficient to sustain such an allegation; but that there ought to have been an examined copy of the record of commitment as recorded in court. Lord *Ellenborough* C. J., before whom the cause was tried at the Sittings at *Westminster* after *Michaelmas* term last, suffered a verdict to be taken for the plaintiff, but reserved the point, and gave the defendant's counsel leave to move to set aside the verdict and enter a nonsuit

(*a*) The habeas corpus in this case was directed to the sheriff of *Middlesex*, commanding him to have the body of *Mary Bergeret de Frouville* detained in prison under his custody under safe and secure conduct, together with the day and cause of her being taken and detained before Lord *Kenyon* C. J. at his chambers in Serjeants' Inn, *Chancery-lane*, *London*, immediately after the receipt of this writ, to do and receive all such things which the Ch. J. should then and there consider of her in this behalf. Dated 25th of *June*, 41 *G.* 3.

The return of the sheriff stated that the prisoner was taken and detained by him by virtue of several bills of *Middlesex*, amongst others, at the suit of *Wigley*. On which was indorsed as follows; "*Mary B. de F.* is this 24th "of *September* 1801 committed to the custody of the marshal, &c. for want "of bail, with the causes within mentioned, by *S. Le Blanc*."

(*b*) 3 *Bos.* & *Pull.* 456. and also from a MS. note of the same case which was read on moving for the rule.

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if the Court ſhould be of opinion that the objection was well founded.

Such a motion was accordingly made and a rule niſi granted laſt term, which was ſupported by *Erſkine*, *Garrow*, and *Wood*; who, in addition to *Turner* v. *Eyles*, referred to *Wightman* v. *Mullens* (a): and it was oppoſed by *Gibbs* and *Marryat*, who diſtinguiſhed this from the other caſes, becauſe they were commitments in execution, and this was a commitment on meſne proceſs, which either was no record at all, at leaſt while continuing in the hands of the officer; in which caſe the allegation was impertinent and to be rejected as ſurpluſage; or if it were a record, the allegation was well proved by producing the original itſelf out of the hands of the officer of the court who had the proper cuſtody of it. *The Court* ſaid that the queſtion being of general conſequence they would look further into it before they gave their opinion. And now

Lord ELLENBOROUGH, C. J. delivered judgment.

This was a motion for a new trial in an action brought againſt the marſhal of the King's Bench priſon for an eſcape on meſne proceſs. The declaration alleged that one *Mary Bergeret de Frouville*, being brought before Sir *S. Le Blanc*, Knt. by virtue of an habeas corpus, was by him thereupon committed to the cuſtody of the marſhal at the ſuit of the plaintiff, "as by the *record* thereof now "remaining in the court of our ſaid lord the now king "before the king himſelf manifeſtly appears." In proof of this commitment of the defendant in that action, verified as alleged to be by *record* thereof, the plaintiff pro-

(a) 2 *Stra.* 1226. and vide alſo *Unwin* v. *Kirchoffe*, *ib.* 1215. and *Pearſon* v. *Rawlins*, 1 *Eaſt*, 405. as to commitments *in execution* which are entered of record.

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duced in evidence the actual *writ of habeas corpus* with the *committitur* of Mr. Justice *Le Blanc* indorsed thereon, *from the office of the clerk of the papers* in the *King's Bench prison*. It was objected on the part of the defendant that the writ of *habeas corpus*, with, the *committitur* entered thereon, having all along remained in the hands of the officer, and in the place above mentioned, as it appeared to have done, and not having been *filed of record* in the court of King's Bench at *Westminster*, was not *a record* of this court within any proper sense of that word; and that therefore the plaintiff, who had in his declaration alleged it so to be, had failed in proving it, and ought on that account to be nonsuited. It appeared to me, from all the account I could obtain at the trial of the deposit and custody of these writs, that they were never kept in any other manner than this was, and that they were never in fact filed or deposited amongst the records of the court in the Treasury-chamber at *Westminster*, or elsewhere; and that therefore the allegation in question was either surplusage, the writ and committitur thereon never being entered *of record* at all; or that the depositing and keeping thereof in the usual place of custody for that purpose was sufficient to maintain the allegation of its remaining *of record*. As, however, it was stated to me that there had been a late case of *Turner* v. *Eyles* decided in the Common Pleas, on the same subject, in which that court had holden that as the party had alleged the existence of such a record he was bound to prove it, the jury under my direction found a verdict for the plaintiff, (which was for 1*s*. only,) and I gave leave to the defendant to move to enter a nonsuit, if the Court should be of opinion that other proof was necessary upon this head. Since the argument upon the motion for a new trial we have caused the most diligent inquiry to be

made

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WIGLEY *against* JONES.

made as to the exiſtence of any records of this kind, and we do not find that any ſuch writs of habeas corpus, with committiturs thereon, have ever been returned to, or filed, or kept by the court or any of its officers, at *Weſtminſter* or elſewhere, except in the place, and by the officer, above-mentioned; but that the ſame have always remained, as any other warrant naturally would, in the hands of the officer to whom it is immediately directed, and whoſe voucher or authority for the act of detaining the party it properly is. Nor, by analogy to the caſe of any ſimilar writs, do we think that they are properly capable of being entered on *record*, either by themſelves or as part of any other record or proceeding. In the caſe of a commitment on a writ of habeas corpus, where the party had been taken upon *a writ of execution*, and which was the caſe in *Turner* v. *Eyles*, 3 *Boſ. & Pull.* 456., it might poſſibly be otherwiſe; and ſuch habeas corpus and commitment thereon might be noticed in the ſheriff's return to the writ of execution filed of record. But that is not the preſent caſe. As, therefore, the writ and committitur neither *are* of *record*, nor are properly *capable* of being ſo, the allegation reſpecting them, as *remaining of record*, is either an impertinent allegation, and may be rejected as ſurpluſage, and requiring no proof, or as at any rate requiring no other proof than it has received, by the production of the writ and return, which are *quaſi of record*; as the *Jamaica* judgment in the caſe of *Walker* v. *Witter*, in *Doug.* 1. was holden to be within the meaning of the words "*of record*" in that caſe, as applied to the ſubject-matter.

Rule diſcharged.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED 1804.

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Forty-fifth Year of the Reign of GEORGE III.

In the last vacation VICARY GIBBS, Esq. one of his Majesty's counsel learned in the law, and Attorney-General to His Royal Highness the Prince of WALES, was made Chief Justice of CHESTER;

AND

SAMUEL COMPTON COX, Esq., JOHN S. HARVEY, Esq., and JAMES STANLEY, Esq., Barristers at Law, were appointed Masters in Chancery.

JONES *against* VAUGHAN and HALL.

Thursday, Nov 8th.

A constable executing the warrant of a justice of peace, and sued in trespass, without the magistrate, is within the protection of the stat 24 Geo. 2. c. 44. f 6, and entitled to a verdict on proof of such warrant, having first complied with the plaintiff's demand of a perusal and copy of the warrant before the action brought, though not within *six* days after such demand, as the act directs.

IN trespass for breaking and entering the plaintiff's dwelling-house and taking his dogs, the defendants pleaded the general issue, and also justified the tres-

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JONES *against* VAUGHAN.

pafs, the one as conftable and the other in his aid, under the warrant of a magiftrate to the conftable to fearch the houfe and take the dogs, granted on information that the plaintiff, not being qualified, kept the dogs there for the purpofe of killing game, &c. Replication de injuriâ, &c. At the trial before *Lawrence* J. at the laft *Hereford* affizes, the fact of the trefpafs being proved to have happened in *January* laft, and that the plaintiff on the 17th of *May* ferved a notice in writing on the defendants, in purfuance of the ftat. 24 *Geo.* 2. *c.* 44. *f.* 6. demanding a perufal and copy of the warrant under which they acted, which demand was not complied with till the 25th of the fame month, when the perufal and copy were given; it was objected on the part of the plaintiff, that the defendants were not entitled to a verdict under the ftatute (*a*), becaufe the demand was not complied with *within fix days* afterwards, according to the requifition of the ftatute, which put them out of the protection of it. But the learned Judge was of opinion, that however the action might have been well profecuted againft thefe defendants if it had been commenced *after* the expira-

(*a*) By f. 6. it is enacted, "That no action fhall be brought againft any "conftable, &c for any thing done in obedience to any warrant of any juftice "of the peace until demand made, &c. by the party intending to bring fuch "action, in writing, of the perufal and copy of fuch warrant, and the fame "hath been refufed or neglected for fix days after fuch demand. And in "cafe, after fuch demand and compliance therewith, by fhewing the faid "warrant to and permitting a copy to be taken thereof by the party de- "manding the fame, any action fhall be brought againft fuch conftable, &c. "for any fuch caufe as aforefaid, without making the juftice who figned or "fealed the faid warrant defendant, that on producing or proving fuch war- "rant at the trial of fuch action, the jury fhall give their verdict for the "defendant, &c. And if fuch action be brought jointly againft fuch juf- "tice and alfo againft fuch conftable, &c. then, on proof of fuch warrant, "the jury fhall find for fuch conftable," &c.

tion

tion of the ſix days, and *before* compliance with the demand of the peruſal and copy of the warrant, yet not having been commenced till after ſuch compliance, the magiſtrate ought to have been made defendant; and that theſe defendants were entitled to a verdict; which was taken for them accordingly.

Jervis now moved for a new trial, on the ground that the ſtatute was imperative on the officer executing the warrant of a magiſtrate to comply with the demand of a peruſal and copy of it within the ſix days, otherwiſe he forfeited the protection of it, and could not reſtore himſelf to his privilege by a ſubſequent compliance with the demand. That this appeared plainly to be the meaning of the firſt part of the clauſe: and was confirmed by the ſubſequent part which ſays, that "in caſe after *ſuch* demand and compliance therewith" any action ſhall be brought without making the juſtice defendant, the officer on proof of the warrant ſhall be entitled to a verdict. For the word *ſuch* has reference to the period of compliance before mentioned as well as to the demand. And the latter part was merely added to ſupply the omiſſion in the former in not ſtating *by whom* the copy of the warrant was to be taken, which is there required to be done by the party demanding the ſame. That if the officer could indemnify himſelf at any time after the ſix days, by giving ſuch peruſal and copy of the warrant, he might be induced to withhold them to a period ſo late as to exclude the injured party from the benefit of his compliance; for by a former clauſe in the act, (*ſ.* 1.) the magiſtrate, who is to be ſubſtituted as a defendant in lieu of the officer, cannot be ſued without one calendar month's previous notice in writing: and by another clauſe, (*ſ.* 8.) the ac-

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tion muſt be brought within ſix calendar months after the act committed.

Lord ELLENBOROUGH C. J. It appears to me that the conſtruction put on the act by my brother *Lawrence* at the trial is the proper one. I do not think that the word *ſuch* is neceſſarily to be referred to the time which is given to the officer to comply with the demand, but that it meant only to refer to "ſuch *demand*" (the word with which it is joined) as was before mentioned, namely, *of the peruſal and copy of the warrant*; which conſtruction will beſt ſatiſfy the object of the act.

GROSE J. declared himſelf of the ſame opinion.

LAWRENCE J. The object of the clauſe in queſtion was the protection of thoſe officers who are charged with the execution of magiſtrates' warrants, who before that time were ſubject to indictment if they did not execute the warrants directed to them, or to vexatious actions if they did. For this purpoſe the Legiſlature propoſed to ſubſtitute the magiſtrate by whom the warrant was granted, and who was ſuppoſed to be cognizant of the legality of it, in lieu of the officer who was merely the inſtrument to execute it, and who was probably ignorant of the grounds on which it iſſued. It therefore has given the officer a period of ſix days after demand of his authority for the production of it, within which time if he comply with the demand he ſecures his indemnity. But if he delay after that time, he ſubjects himſelf to be ſued as any other perſon, and it is then his own fault if the party ſue him before he has complied with the demand. But neither the words nor the intent of the act exclude

his protection unless he comply within the six days, provided the party do not sue him in the interval, after the six days, and before such his compliance. And this construction will, I think, best insure the object of the Legislature. 1804.

JONES *against* VAUGHAN.

LE BLANC J. It must be the party's own fault if he delay demanding a copy of the warrant till it be too late to sue the magistrate. And if the demand be made in time, and the officer, to protect whom was the principal object of the clause in question, delay to comply with it, after the six days allowed him by the statute, he acts at his peril till he do comply, and subjects himself in the interval to be sued as any common person.

Rule refused.

HUNT *against* SILK.

Friday, Nov. 9th.

A. agreed, in consideration of 10*l.* to let a house to *B.*, which *A.* was to repair and execute a lease of *within ten days*, but *B.* was to have immediate possession, and in consideration of the aforesaid was to execute a counterpart and pay the rent. *B.* took possession and paid the 10*l.* immediately, but *A.* neglected to execute the lease and make the repairs beyond the period of the ten days, notwithstanding which *B.* still continued in possession: held that *B.* could not, by quitting the house *for the default of* A., rescind the contract and recover back the 10*l.* in an action for money had and received, but could only declare for a breach of the special contract; for a contract cannot be rescinded by one party for the default of the other, unless both can be put in statu quo as before the contract: and here *B.* had had an intermediate possession of the premises under the agreement.

IN assumpsit for money had and received, the facts appeared at the trial before Lord *Ellenborough* C. J. at the last sittings at *Westminster* to be these. On the 31st of *August* 1802 an agreement of that date was made between the parties, whereby the defendant, in consideration of 10 *l. to be paid at the time of executing the lease* after mentioned, and for other considerations therein stated, agreed that *within ten days* from the date thereof he would grant to the plaintiff a lease of a certain dwelling-house for nineteen years (determinable by the plaintiff in 5, 10,

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HUNT *against* SILK.

or 15 years) from the* 29th of *September* then next, (but possession to be immediately given to the plaintiff,) at the yearly rent of 63*l.* And the defendant also agreed at his own expence to make certain alterations in the premises, and that the premises, fixtures, and things should *at the time of executing the lease* be put in complete repair. And the plaintiff, *in consideration of the aforesaid*, agreed to accept the lease at the rent and in manner aforesaid, and to execute a counter-part, and pay the rent. The plaintiff took immediate possession of the premises under the agreement, and paid the 10*l.* at the same time in confidence that the alterations and repairs stipulated for would be done within the ten days; but that period and some days after having elapsed, and nothing being done, notwithstanding several applications to the defendant to perform the work, the plaintiff quitted the house, giving the defendant notice of his having rescinded the agreement in consequence of the defendant's default, and brought this action to recover back the money he had paid. Lord *Ellenborough* however thought that the plaintiff was too late to rescind the contract, and that his only remedy was on the special agreement, and therefore directed a nonsuit. Which

Reader now moved to set aside, and to have a new trial, on the authority of *Giles* v. *Edwards* (*a*), where the defendant agreed to sell to the plaintiff all his cord wood then growing at 11*s.* 6*d.* per cord ready cut, which the plaintiff was to pay for in *March* 1792, and the defendant was to cut, cord, and clear from off the premises by *Michaelmas* following. And the custom of the country was for the feller to cut off the boughs and trunks, and

(*a*) 7 Term Rep. 181.

cord

cord the wood, and for the buyer to record it, after which it became his property. In *March* 1792 the plaintiff paid 20 guineas on account; and the defendant having corded only ten out of ſixty cords which were cut (half a cord of which the plaintiff had recorded, and meaſured the reſt), and neglecting to cord the remainder of the wood, the plaintiff gave notice of reſcinding the contract, and brought an action for money had and received to recover back what had been paid. The ſame objection was there made as is now inſiſted on; but *Lawrence* J. before whom it was tried overruled it, on the ground that as it was the defendant's own fault that the contract which was entire was not executed, the plaintiff might recover back the money he had paid, the conſideration having failed. And this direction was approved by the Court, upon a motion for a new trial. So here the contract was entire: the 10*l.* was to be paid in conſideration of the repairs being done, and the plaintiff was not bound to have paid it before; nor could the defendant have ſued him for it without averring performance on his part. But the plaintiff, having paid it upon the faith of the agreement which has not been performed by the defendant, has paid it in his own wrong and without conſideration. The former caſe is even ſtronger than this; for there was a partial performance of the contract by both parties, whereas here the defendant has done nothing towards the execution of it. And again, in that caſe the money was paid in purſuance of the terms of the contract, and ſo far confirmed it, whereas here the plaintiff was not bound by the contract to have paid any thing, and therefore the payment was no affirmation of it, but was made merely upon the confidence that it would be performed, a conſideration which has wholly failed.

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Lord ELLENBOROUGH C. J. Without queſtioning the authority of the caſe cited, which I admit to have been properly decided, there is this difference between that and the preſent; that there by the terms of the agreement the money was to be paid antecedent to the cording and delivery of the wood, and here it was not to be paid till the repairs were done and the leaſe executed. The plaintiff there had no opportunity by the terms of the contract of making his ſtand to ſee whether the agreement were performed by the other party before he paid his money, which the plaintiff in this caſe had: but inſtead of making his ſtand, as he might have done, on the defendant's non-performance of what he had undertaken to do, he waved his right, and voluntarily paid the money; giving the defendant credit for his future performance of the contract; and afterwards continued in poſſeſſion notwithſtanding the defendant's default. Now where a contract is to be reſcinded at all, it muſt be reſcinded in toto, and the parties put in ſtatu quo. But here was an intermediate occupation, a part execution of the agreement, which was incapable of being reſcinded. If the plaintiff might occupy the premiſes two days beyond the time when the repairs were to have been done and the leaſe executed, and yet reſcind the contract, why might he not reſcind it after a twelvemonth on the ſame account. This objection cannot be gotten rid of: the parties cannot be put in ſtatu quo.

GROSE J. of the ſame opinion.

LAWRENCE J. In the caſe referred to, where the contract was reſcinded, both parties were put in the ſame ſituation they were in before. For the defendant muſt at

any

any rate have corded his wood before it was ſold. But that cannot be done here where the plaintiff has had an intermediate occupation of the premiſes under the agreement. If indeed the 10*l.* had been paid ſpecifically for the repairs, and they had not been done within the time ſpecified, on which the plaintiff had thrown up the premiſes, there might have been ſome ground for the plaintiff's argument that the conſideration had wholly failed: but the money was paid generally on the agreement, and the plaintiff continued in poſſeſſion after the ten days, which can only be referred to the agreement.

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HUNT *againſt* SILK.

LE BLANC J. The plaintiff voluntarily conſented to go on upon the contract after the defendant had made the default of which he now wiſhes to avail himſelf in deſtruction of the contract. But the parties cannot be put in the ſame ſituation they were in, becauſe the plaintiff has had an occupation of the premiſes under the agreement.

Rule refuſed.

The KING *againſt* The Inhabitants of ABERAVON.

Saturday, Nov. 10th.

D. *Jones* appealed to the Quarter Seſſions of *Glamorganſhire* againſt a poor rate, made for the pariſh of *Aberavon* in that county, and the Seſſions quaſhed the rate, ſubject to the opinion of this Court on the following caſe.

Where a corporation was ſeiſed in fee of certain uninclosed lands, which were ſtocked with the cattle of the reſident burgeſſes, or the widows of ſuch, who alone were permitted by the burgeſſes to claim ſuch right, and alſo by poor pariſhioners, who were admitted to ſuch enjoyment from charity; and ſuch lands were altogether omitted out of the poor rate; the Seſſions on appeal by one who had given notice of his objection to the pariſh officers, and to the corporation as the party intereſted under the ſtat. 41 *Geo.* 3. *c.* 23. *ſ.* 6. having *quaſhed* the rate, this Court confirmed that order.

The

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The parish, town, and borough of *Aberavon* in the county of *Glamorgan* are co-extensive, and have church-wardens and overseers appointed in the common way. The portreeve, aldermen, and burgesses, some of which latter reside in the borough and parish, some in the neighbourhood, and others at a distance, are seised in fee in their corporate capacity of certain inclosed lands, to the amount of acres, and they are also in like manner seised of 2 or 300 acres of uninclosed marsh lands, called *Aberavon Marsh*, worth 10*s.* an acre, and of about 100 acres of mountain, worth 5*s.* an acre. The inclosed land is annually parcelled out between the resident burgesses, who occupy the same as tenants, paying to the corporation certain rents according to the size and value. These inclosed lands are charged in the rate to the burgesses, the renters, as occupiers, in proportion to their several rents, and as such those burgesses pay the poor rates, and also the land-tax, to which the inclosed lands are also rated. In the poor rate the inclosed lands are charged under the title of "*The Burgesses land,*" (which covers the three columns in the other part of the rate reserved for *landlords*, *tenements*, and *occupiers*,) adding the person's name from whom the rate is collected, and the valuation of his occupation, and the sum to be collected. The corporation have not any live stock by which they can occupy, nor any personal chattels, except their maces and halberts. The uninclosed marsh and mountain have never been charged to either land-tax or poor rate. They are occupied as common land by the individual burgesses or their widows who are residents, and keep stock to occupy; but those burgesses who have not any stock, or are non-resident, do not receive any benefit from the same. The burgesses do not permit any person but burgesses or their widows to claim

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claim a right of pasturage on these uninclosed lands, but they suffer by way of charity and in ease of the parish some poor persons who are residents, not being burgesses, to depasture there. Of those who depasture every person occupies according to the quantity of his stock, so that one occupier may have 18 head of cattle and 100 sheep, there being no limitation, and another not more than one cow, or one horse, or even one sheep. In the poor rate in question the uninclosed marsh and mountain lands are as usual left out. And *D. Jones* gave notice of appeal against the rate to the churchwardens and overseers of the poor of the parish, and also to the portreeve, aldermen, and burgesses of the town and borough of *Aberavon*, stating therein, as the ground of objection, that they had omitted to rate the marsh and mountain lands, called *Aberavon Marshes*, and *Aberavon Mountain*, all which said premises were in the possession or occupation of the said portreeve, aldermen, and burgesses. This notice was admitted to be well served on the churchwardens and overseers of the poor, and on the portreeve, aldermen, and two of the principal burgesses in their corporate capacity; but the majority of the resident burgesses and other persons who were occupiers of the said uninclosed lands were not served, and a number of out-dwelling burgesses within the county and jurisdiction of the court were not served. On the hearing of the appeal the questions before the Court were, first, whether these uninclosed lands should, under the circumstances of the occupation, be rated at all: secondly, whether, if they were rateable, the portreeve, aldermen, and burgesses were to be considered as occupiers, and to be rated as such, and notice of appeal to them in their corporate capacity to be deemed sufficient; or whether the several and respective burgesses and other persons

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who were the actual occupiers were not the perfons to be rated, and that in proportion to their refpective ftocks: and if fuch perfons were to be rated, whether the Court could quafh or amend the rate without fuch perfons firft having notice under the ftat. of the 41 *Geo.* 3. *c.* 23. *f.* 6., which they had not.

Praed Serjt. and *Bevan*, in fupport of the order of feffions, contended, 1ft, That the uninclofed lands, producing profit, were clearly rateable (which was not denied). 2dly, That the corporation who were the owners of the fee were properly rated for fuch land in their corporate capacity, there being no known diftinct occupation by any other; according to *R.* v. *Gardner* (a). The perfons who actually ftock the land are either the different members of the corporation, who, *as fuch*, claim the privilege, or the widows of fuch, who are admitted by the curtefy of the body to participate in their enjoyment, or poor perfons who are fuffered to turn ftock there out of charity, and in eafe of the parifh, who have never been deemed proper objects of rating. The enjoyment of the common being indifcriminately by fuch of the burgeffes as are refident and have ftock cannot conftitute an occupation diftinct from that of the corporation in general in right of which they fo enjoy it: and the value of the individual enjoyment is liable to fluctuate from day to day, and cannot be afcertained; which differs thefe from the inclofed lands, where the refpective burgeffes have individually an exclufive occupation of their feveral fhares, diftinct from the poffeffion of the corporation itfelf. In order to render thefe perfons individually rateable they

(a) Cowp. 79.

must

muſt be conſidered as tenants to the corporation; whereas they aſſume to occupy in their own right as members of the corporation, and not as tenants, whether with or without rent. Then as to the poor perſons who are permitted out of charity to turn upon the common, they cannot be conſidered as occupiers who are rateable. [*Lawrence* J. The mere circumſtance of a perſon being permitted to occupy land out of charity is no objection to his being rated in reſpect of ſuch occupation (*a*). Suppoſing the perſons to be tenants at will without rent, they would not therefore be exempt from being rated.] They are not *tenants* at will; they have no intereſt at all in the land, which a tenant at will has till the will is determined. Then taking the corporation to be the occupiers of the common land by means of the actual occupation of their own members generally, and of thoſe perſons who as their ſervants are allowed a gratuitous occupation; the notice required by the ſt. 41 *G.* 3. *c.* 23. *ſ.* 6. to be given to the parties *intereſted*, as well as to the pariſh-officers, where a rate is appealed againſt for the omiſſion of any perſon who ought to be rated, has been complied with. That entitled the appellant to have his appeal heard, and to obtain redreſs; and it was diſcretionary in the Seſſions afterwards whether they would quaſh the rate on account of the magnitude of the omiſſion or the uncertainty of the value to be added to the rate. And at all events, ſuch a primâ facie caſe of occupation by the corporation was proved as called upon them to ſhew a diſtinct occupation in other perſons; according to the doctrine in *Rex* v. *Gardner*. And this is a more reaſonable conſtruction of the act than requiring notice to be given to every individual who may happen to turn a ſingle ſheep upon the

(*a*) Vide *Rex* v. *Munday and Others*, 1 *Eaſt*, 584.

common

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common one day and none the next, whose numbers it would be scarcely possible to ascertain, and still less the value of their several interests in order to rate them equally. The corporation is the only body really "interested in the event of the appeal," within the fair meaning of the act. But supposing it were uncertain in whose occupation the common lands were, yet the subject matter being admitted to be rateable, and not rated, it was sufficient to warrant the Sessions in quashing the rate to compel the parish officers, whose proper duty it is, to find out in whose occupation the property really was, and make their assessment accordingly.

Erskine and *Comyn* contrà. The stat. 41 *Geo.* 3. *c.* 23. *s.* 6. is peremptory, that any appellant objecting to a rate on account of the omission of any person, shall give notice to the party interested as well as to the parish officers, in order to enable such party to come and defend his interest, and the appellant is not entitled to be heard without proving such notice. Then every such appellant is bound to know who the persons are, the omission of whom in the rate he complains of; and if he cannot give reasonable evidence to satisfy the Sessions that such party ought to have been included, his appeal must be dismissed. It is not enough to shew that some other person is omitted to whom he has not given the notice required by the act; because if that person were before the Court he might be able to satisfy it that the omission was proper; and therefore in a doubtful case the notice required would be purposely withholden in order the more easily to procure the rate to be quashed upon ex parte evidence. But upon the case stated, so far from its being shewn that the corporation were the occupiers of the common land, that

their occupation is negatived; for it is ſtated that they had no ſtock wherewith to occupy it, and an actual occupation is ſhewn by others, to whom there was no notice to defend, as required by the ſtatute. It is not enough to ſhew that property yielding profit is omitted in a rate, without ſhewing ſome beneficial occupier who is liable to be rated for it; as in the caſe of *St. Luke's* hoſpital (*a*). The poor's rate is not a tax upon property, but upon perſons in reſpect of property. And the law does not look to the title, but the actual beneficial occupier. The ſeveral burgeſſes then who turned upon the common have an individual beneficial occupation of it diſtinct from any corporate character, though ſuch benefit may be derived to them through that title. In like manner as the officers of an hoſpital, who have an individual benefit derived to them from their occupation of certain rooms, are rateable in reſpect of that beneficial occupation. The circumſtance of their occupying without payment of rent only proves their occupation to be more beneficial. Beſides, in order to apply the occupation of individual members of the corporation to the corporation itſelf, all the members ought to enjoy the ſame privilege, whereas this is confined to the reſident members. Then again the occupation of the widows of corporators can only be applied to an individual occupation. And the circumſtances of other perſons being permitted to occupy out of charity does not render them leſs liable to be taxed in reſpect of the property which they ſo enjoy.

Lord ELLENBOROUGH C. J. The caſe is very looſely and inaccurately drawn. We ought to have the right of

(*a*) 2 *Burr.* 1053.

enjoy-

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enjoyment more diftinctly ftated. It does not appear whether the burgeffes who turned ftock on the common did fo in right of their franchife, or by permiffion of the corporate body. I own I have great difficulty in deciding that a perfon who has a mere permiffion to turn his cattle on another's land is rateable as an occupier.

GROSE J. The queftions put at the end of the cafe might be very proper to be confidered by the Seffions; but that is not the proper form of drawing up a cafe for the opinion of this court. We can only fay whether the Seffions have done legally in quafhing the rate.

The Court then feemed inclined to fend the cafe back to the Seffions to be reftated; but after fome further confultation on the bench,

Lord ELLENBOROUGH C. J. faid, on further confideration, I think we may deal with the cafe as it is. Here is a large track of property producing profit which is liable to be rated, and no perfon is in fact rated for it. This property is ftated to belong to the corporation, and it may be doubtful whether the occupation fhewn be their occupation or that of individuals. Under thefe circumftances I cannot fay that the Seffions have done wrong in quafhing the rate. The rate therefore is quafhed becaufe no perfon has been rated for property which ought to have been rated.

Per curiam. Order of Seffions confirmed.

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COXETER *against* BURKE and Another, Bail of PRICE.

Saturday, Nov. 10th.

A fcire facias upon a recognizance of bail taken in open court in *B. R.* is properly fuable in *Middlefex*, where the record is, though all the previous proceedings which commenced by original were in *London*. And femble that it could not be fued elfewhere than in *Middlefex*.

THE principal was arrefted on a teftatum fpecial capias iffued out of *London*, where the action was commenced by original, and the venue laid there: and the bail were alfo put in with the filacer for *London*, but they juftified *in open court at* Weftminfter. And after judgment by default and a writ of inquiry executed, and final judgment entered, and a writ of capias ad fatisfaciendum iffued into *London*, which was returned non eft inventus, writs of fcire facias and alias fcire facias iffued againft the bail, and were lodged with the fheriff of *Middlefex*, and two nihils returned. Whereupon this rule was obtained by

Garrow and *Lawes*, for fetting afide the proceedings againft the bail for irregularity, becaufe the writs of fcire facias ought to have been profecuted in the fame county in which all the prior proceedings were had, according to *Harris* v. *Calvert and another* (a), and where the bail might naturally expect to look for thofe proceedings, by which it was the intention of the law and practice of the court to give them notice to render their principal.

Humphreys, who fhewed caufe againft the rule, faid, that in the cafe referred to the Court confidered the bail which had been put in improperly in *Middlefex* as a nullity, and therefore that there was nothing to warrant the fuing out of the fcire facias in that county; but here the

(a) 1 *Eaft*, 603.

 recog-

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recognizance of bail was regularly taken in *Middlesex*, and consequently there could be no objection to suing upon it, as upon a record, in the same county. And he cited *Bond* v. *Isaac* (a) as in point, that the scire facias must be sued out into *Middlesex* where the recognizance remained, and not into *London* where the original cause of action was. He also insisted that the irregularity, if any, had been waved, because the defendants had appeared to the scire facias since the rule nisi had been obtained. But to this latter ground it was answered, and so ruled by the Court, that the rule having been obtained on the last day of last term, which was no stay of proceedings, the defendants were obliged to appear, and therefore it was no waver. And on the principal point

The Court were clearly of opinion, that the writs of scire facias and alias scire facias were regularly prosecuted in *Middlesex*, where the recognizance of bail was recorded. And

Lord Ellenborough C. J. referred to *Shuttle* v. *Wood* (b) as in point; and added, that it never was doubted but that an action founded on matter of record might be brought

(a) 1 *Burr.* 409.

(b) *Salk.* 564. 600. 659. 6 *Mod.* 42. and *Holt's Rep.* 612. According to this case the action on the recognizance of bail in *B. R.* can only be brought in *Middlesex*, because it is always entered generally as taken in court, though taken actually by a Judge at chambers; and it is no record till entered. But it is otherwise in *C. B.*: where the recognizance binds as a record from the first caption, and before it is filed at *Westminster*: and therefore where it is taken by a Judge of *C. B.* at Serjeants' Inn, in which case a special entry is made of its being so taken on a day certain, and afterwards it is filed at *Westminster*, a scire facias lies on it either in *London*, where it is so taken, or in *Middlesex*, where it is filed and becomes a record in court. And vide *Hall* v. *Winckfield*, *Hob.* 195. *Pickering* v. *Thomson*, *Barnes*, 207. *Cock* v. *Green*, *G. Cooke's Rep.* 31.; and *Kenny* v. *Thornton*, 2 *Blac. R.* 768.

in,

in the county where the record was filed; and that that was the proper county, though in some special cases there might be an option between that and some other county where the cause of action in part arose. That here the scire facias was properly brought in *Middlesex*, whether the principal action were commenced by original or by bill. And *Lawrence* J. observed of the case of *Harris* v. *Calvert*, that the only point decided was that the *putting in* of bail in *Middlesex* by mistake, where all the prior proceedings in the cause were in *London*, was a nullity, and therefore did not warrant the suing out of the scire facias in *Middlesex*.

Rule discharged.

WOOLNOTH *against* MEADOWS.

Tuesday, Nov. 13th.

Slanderous words must be understood by the Court in the same sense as the rest of mankind would ordinarily understand them. Therefore where one said of another that *his character was infamous*, that *he would be disgraceful to any society*, that *those who proposed him as a member of any society must have intended an insult to it*, that *he would publish his shame and infamy*, that DELICACY *forbad him from bringing a direct charge*, *but it was a* MALE *child who complained to him*; such words were understood to mean a charge of unnatural practices, and sufficiently certain in themselves to be actionable, without the aid of an *inuendo* to that purpose, which it was admitted could not enlarge the sense. And held that such words could not be justified by any plea naming, for the first time, the person from whom the defendant heard the complaint.

IN an action on the case for slander the plaintiff declared, That whereas he had never been guilty nor suspected of the detestable crime of buggery, or of any other such detestable crime, or of any attempt or disposition to commit the same, &c.; but had obtained the good opinion of divers subjects, and had been proposed as a volunteer for the defence of the country at a certain society, &c., yet the defendant knowing the premises, but maliciously intending to injure the plaintiff, and to subject him to the pains and penalties of the law, &c., and to cause it to be believed that he was a person of unnatural passions, and guilty of the crimes aforesaid,

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or ſome of them, and to cauſe him to be rejected as a volunteer by the ſaid ſociety, and to be abhorred and ſhunned by all mankind, as a perſon unfit for and unworthy of all ſociety, on, &c., in a certain diſcourſe which the defendant had with divers ſubjects, members of the ſaid ſociety, &c., wrongfully, falſely, and maliciouſly ſpoke theſe falſe, ſcandalous, and malicious words of and concerning the plaintiff having been propoſed as a volunteer as aforeſaid, viz., *His* (meaning the plaintiff's) *character is infamous. He would be diſgraceful to any ſociety. Whoever propoſed him muſt have intended it as an inſult. I will purſue him and hunt him from all ſociety. If his name is enrolled in the royal Academy, I will cauſe it to be eraſed, and will not leave a ſtone unturned to publiſh his ſhame and infamy; delicacy forbids me from bringing a direct charge, but it was a male child of nine years old who complained to me* (meaning that a male child of nine years old had complained to the defendant of ſome unnatural crime committed by the plaintiff upon ſuch male child). And then the plaintiff averred that the words were ſo uttered and publiſhed by the defendant with intent and meaning to convey, and that the ſame were by the ſaid perſons in whoſe preſence they were ſo uttered and publiſhed, underſtood and believed to convey a charge againſt the plaintiff that he was a perſon of unnatural paſſions and appetites, and was capable of committing, and had committed the abominable crime of buggery, and was thereby rendered infamous, and unworthy of all ſociety, &c. There were ſeveral other counts, laying the ſame charge in different ways. To this the defendant pleaded, 1ſt, The general iſſue; 2dly, As to the words laid in the firſt count, that before the ſpeaking and publiſhing them, to wit, on, &c. a certain male child of nine years old, to

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wit, one *A. B.* did complain to the defendant of an unnatural crime before that time committed by the defendant upon ſuch male child. And ſo the defendant juſtifies ſpeaking the words. To this there was a general demurrer; and to this and a third plea to the ſame count, in ſubſtance the ſame, there were aſſigned as ſpecial cauſes of demurrer, that the defendant had not juſtified or anſwered the ſpecial matter of the firſt count, nor had averred that the complaints in thoſe pleas reſpectively alleged to have been made to the defendant were true, or that the defendant believed the ſame to be true; and that the matter of thoſe pleas do not amount to a traverſe of the firſt count, but are conſiſtent therewith, &c.; and that the matters attempted to be put in iſſue by thoſe pleas are immaterial, &c. The ſame cauſes of demurrer were aſſigned to the fifth plea, which contained a ſimilar juſtification of the words as laid in the other counts of the declaration. And to the fourth and ſixth pleas, the one applying to the firſt, and the other to all the counts, alleging, by way of juſtification, the fact of the plaintiff's having committed the crime imputed to him as well as the relation of *A. B's.* complaint to the defendant before the uttering of the words, the plaintiff replied de injuriâ ſuâ propriâ abſque tali cauſâ.

Scarlett, in ſupport of the demurrer, relied on the authority of the rule in Lord *Northampton*'s caſe (*a*), recognized in *Davis* v. *Lewis* (*b*), that if one ſpeak ſlanderous words without naming at the ſame time the perſon from whom he heard them, he cannot afterwards juſtify it by naming the original ſlanderer. The reaſons for which are, that, by naming the perſon at the time, he gives the party in-

(*a*) 12 *Rep.* 133, 4. (*b*) 7 *Term Rep.* 17.

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jured an action against such slanderer, and is himself a witness to prove it; and he also does not pledge his own credit to the slander, but merely that of the first relator of it, which so far abates the injurious effect of it. Upon this ground the justifications demurred to, where the name of the original author of the slander is first mentioned, are bad. But further, it would not be enough for the defendant even to name the author if, as in this case, he repeat the slander in such a manner as to signify his own belief of, and intention to act upon it. As in *Maitland* v. *Goldney* (a) it was considered by Lord *Ellenborough* that one who repeated slander, after knowing it to be unfounded, could not justify it by having named his author at the time.

Burrough, contrà, contended that the declaration itself was bad, because there was no direct negative of the boy's having made the complaint, as in *Meggs* v. *Griffith* (b); which accounts for the question of justification having been there entered into upon the plea of not guilty, which put in issue the fact of the defendant having heard the slander from another before he repeated it. And *Crawford* v. *Middleton* (c) is in point to this: where the plaintiff having declared for slanderous words charging him with felony, said by the defendant to have been spoken of the plaintiff by a person whom the defendant met on the road, judgment was arrested by the opinion of three judges for want of an averment that in truth nobody had said such words to the defendant; against the opinion of *Twysden* J. who thought that the words being laid to be spoken falsely and maliciously, and so found by the verdict, was a proof that nobody had said so to him.

(a) 2 *East*, 426. (b) *Cro. Eliz.* 400. (c) 1 *Lev.* 82.

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[Lord *Ellenborough* C. J. The rule in Lord *Northampton's* cafe, confirmed in *Davis* v. *Lewis*, is, that flanderous words can in no cafe be juftified upon the report of another, unlefs the name of the original flanderer be given at the time.] Thofe cafes only apply where an action would lie upon the words againft the original fpeaker. But here no action could have been maintained againft the boy upon any words imputed to him. And where words are uncertain in themfelves, as thofe fpoken by the defendant, they cannot be rendered more certain by an innuendo, without firft introducing prefatory matter to which they may be applied, as was fettled in *Rex* v. *Horne* (*a*). An innuendo cannot enlarge the fenfe, which is attempted to be done, by introducing under it, that the words fpoken, which were merely that a male child had *complained* to the defendant, meant that fuch male child had *complained* to the defendant *of fome unnatural crime*. [Lord *Ellenborough* C. J. Confider the cafe then as if the innuendo were ftruck out, and attend to the words themfelves; whether, when taken altogether, they do not naturally import a charge of this fort. *Grofe* J. We muft read the words in the fame fenfe as common people who heard would underftand them.] The words are certainly abufive; but they do not in themfelves neceffarily point to the particular crime; though they might have been fhewn to have done fo by introductory matter. If the plaintiff had been before charged with having been guilty of indecency to a woman, thefe words would have been equally applicable.

Scarlett, in reply, obferved, that the opinion of the three judges in *Crawfurd* v. *Middleton* went upon the ground that the defendant might have juftified the flan-

(*a*) *Cowp.* 684.

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derous words upon the report of another without naming him at the time; which was contrary to the rule in Lord *Northampton*'s cafe, now fettled to be law. That from the frequency of actions for flander in former times the judges were accuftomed to conftrue the words in mitiori fenfu, where they would in ftrictnefs admit of different conftructions; but fince the cafe of *Baker* v. *Pierce* (*a*) a more fenfible rule has prevailed, namely, to conftrue words in the fenfe in which they are commonly underftood, as applied to the fubject matter. And *Phillips* v. *Kingston* (*b*) is to the fame effect. [*Lawrence* J. Many of the old cafes on flander went to a very abfurd length. There is one (*c*) where the charge was, that the plaintiff "had ftruck his cook on the head with a cleaver and cleaved his head; the one part lay on one fhoulder, and another part on the other;" and yet the judgment was arrefted after verdict becaufe it was not directly averred that the cook was killed, but only argumentatively. But all thofe cafes have been long fet at reft.] Then as to the objection, that the words do not point at any certain crime, it is impoffible to read them without underftanding what fort of crime was meant to be imputed. The only ufe of the innuendo was to fix the defendant's intention to be to ufe the words in the common acceptation of them. The words ftate that the Plaintiff is unfit for all fociety, that he is unfit for the fociety of *men*; that the defendant would publifh his fhame and infamy; that he was reftrained by *delicacy* from bringing a direct charge, and that the complaint was made to him by a *male* child of nine years old.

(*a*) 2 *Ld. Ray.* 959. Vide *Button* v. *Hayward*, as reported in 1 *Vin. Abr.* 507. from MS.

(*b*) 1 *Ventr.* 117. (*c*) This is the cafe of Sir *T. Holt* v. *Aftgrigg*, *Cro. Jac.* 184.

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Lord ELLENBOROUGH C. J. (after ſtating the pleadings). The pleas demurred to are bad, becauſe they fall directly within the rule laid down in Lord *Northampton*'s caſe (*a*), which was confirmed in the late caſe of *Davis* v. *Lewis* (*b*), that in order to enable a defendant to juſtify ſlanderous words upon hearſay he muſt diſcloſe at the time of uttering the ſlander the name of the perſon from whom he heard it, and it is not ſufficient to name him for the firſt time by his plea; the object of which is to give the plaintiff his action in the firſt inſtance againſt the original author of the ſlander. The pleas then being out of the way, the queſtion ariſes upon the ſufficiency of the words laid in the declaration to maintain the action. And it is firſt objected that it ſhould have been averred that nobody had made the complaint ſtated to the defendant. But that objection is founded upon the ſuppoſition, that if it had been ſo averred, the defendant would have been let into proof that ſuch complaint had in fact been made to him, and that he could have thereby juſtified ſpeaking the words. Lord *Northampton*'s caſe, however, is an anſwer to that. If there had been ſuch an averment, it would have been wholly immaterial to the defendant's juſtification, becauſe he did not name the party at the time from whom he received the complaint. That brings it to the ſecond queſtion, whether the words ſpoken, unaſſiſted by the innuendo at the concluſion of them, which it muſt be admitted can only explain, and cannot extend the meaning of the antecedent words, do in their plain obvious meaning import the charge of any certain crime? and upon that I think there can be but one opinion. The defendant begins by ſaying, that the plaintiff's character is *infamous*. That

(*a*) 12 *Rep.* 133, 4. (*b*) 7 *Term Rep.* 17.

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of itſelf might only import general infamy; that he would be diſgraceful to any ſociety; that whoever propoſed him muſt have intended it as an *inſult*, meaning to the particular ſociety of which he was propoſed as a member; that is ſomewhat ſtronger, but might ſtill be general. Then he ſays he will purſue and hunt him from *all ſociety*. That ſhews that he intended to ſpeak of ſome crime which rendered him unfit for ſociety. Then he ſays that *delicacy* forbids him from bringing a direct charge. That points to ſome ſpecies of infamy, mixed with the intercourſe of the *ſexes*; and of what nature that was he alludes in a manner not to be miſtaken, when he adds that it was a *male* child of nine years old who *complained* to him. What elſe could the defendant mean by theſe expreſſions, but to charge the plaintiff with ſome infamous crime which would expel him from all ſociety, and that crime relative to a male child, which delicacy forbad him to make the ſubject of a direct charge. Applying our underſtanding to theſe words like any common perſons, can we give them any other meaning than that which the pleader meant to give them by the innuendo at the concluſion. But it does not ſtop here, for the count goes on to aver "that the words were ſo uttered and publiſhed by the defendant with intent and meaning to convey, and that the ſame were by the perſons in whoſe preſence they were ſo uttered, underſtood and believed to convey a charge of an unnatural crime againſt the plaintiff." Now upon a count ſo framed, the plaintiff muſt have gone into other proof than of the mere ſpeaking of the words, and he muſt have not only ſhewn that the defendant's meaning was to impute a crime of that nature to the plaintiff, but that the words were ſo underſtood by the hearers.

 There-

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Therefore not only upon the words themselves, but followed as they are by the last-mentioned averment, we must take them to have been spoken in the sense imputed.

GROSE J. We are first to consider whether the declaration be bad; and if that be sufficient, whether the pleas in question be an answer to it. As to the declaration, I agree that the innuendo cannot extend the meaning of the words: and then the question is, whether the words be in themselves actionable? Now a court of justice must read the words in the same sense in which the hearers would at the time they were spoken understand them. When I first read them I had no idea that any serious doubt could be entertained of the sense meant to be conveyed by them, namely, an imputation of an unnatural crime. I think so still; and therefore must consider the declaration as sufficient. Then as to the sufficiency of the pleas demurred to; I cannot say, under the authority of the late determinations, that those pleas can be supported. The question having been so lately under consideration, it is unnecessary to enlarge upon it; it is sufficient to say, that I adhere to the rule laid down in *Maitland* v. *Goldney* (a), as collected from the former cases, that in order to justify the repetition of slanderous words spoken by another the defendant must give a certain cause of action against that other by naming the author of the slander, and giving the very words which he used.

LAWRENCE J. On the authority of Lord *Northampton's* case, and the subsequent cases, I agree that the pleas demurred to are bad: and I think that the rule on

(a) 2 *East*, 437.

which

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(*a*) *Cowp.* 275-8.

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LE BLANC J. It is clear that the pleas cannot be supported upon the cases which have been decided, because a person who reports slanderous words which he heard from another must give the name of the person from whom he heard it at the time he reports it; and it is not sufficient to do so for the first time in his plea to an action for those words. Then as to the sufficiency of the declaration, if the words themselves do not convey to all persons who hear them what the sense of the speaker was, I admit that they cannot be extended by an innuendo. But nobody can read these words without seeing what they meant to impute against the plaintiff. It is not sufficient to shew by argument that the words will admit of some other meaning; but the Court must understand them as all mankind would understand them, and we cannot understand them differently in court from what they would do out of court. And it would be impossible for a number of persons, indifferently assembled, not to agree in the meaning which has been imputed to these words in the declaration.

Judgment for the plaintiff upon the demurrers to the 2d, 3d, and 5th pleas.

COLLINS *against* Ld. Viscount MATHEW.

Tuesday, Nov. 13th.

A plea of nul tiel record, pleaded to an action of debt on an Irish judgment recovered, must conclude to the country; for though, since the Union, such judgment be a record, yet it is only proveable by an examined copy on oath, the veracity of which is only triable by a jury.

THE plaintiff declared in debt upon a judgment recovered in the court of Exchequer in *Ireland* for 360*l.* 16*s.*, and also 50*s.* and 2*d.* *Irish* currency, for damages and costs, "as by the *record* and proceedings thereof remaining in the said court of our Lord the King of his Exchequer

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chequer at *Dublin* in *Ireland* aforesaid, more fully appears, &c. which said judgment still remains in the same court of *Dublin* in *Ireland* aforesaid in full force and not satisfied," &c.: and concluding with an averment that the said 360*l.* 16*s.* and 50*s.* 2*d.* so recovered were of the value of 335*l.* 7*s.* 2*d.* of lawful money of *Great Britain*. To this there was a plea of nul tiel record, with a verification; and a demurrer on the part of the plaintiff to such plea; assigning for special causes, that the plea of *nul tiel record* is not pleadable to an action of debt on a foreign judgment; or, if pleadable at all, it ought to have concluded to the country, and not with a verification.

Wood, in support of the demurrer, contended at first that this fell within the same distinction as governed the case of actions on foreign judgments, to which it was settled that *nul tiel record* could not be pleaded. For since the appellate jurisdiction of this Court from the courts of *Ireland* was taken away (*a*), there is no method of bringing the original *Irish* record into this court, and consequently no way of trying its existence but by an examined copy, and that verified on oath, of which a jury only can judge, and not the court by whom the question of the identity of our own records is properly determinable. And this gives rise to the next objection, that if it be pleadable at all as a *record*, the plea ought to have concluded to the country, and not with a verification.

The Court now intimated a clear opinion, that since the Union between *Great Britain* and *Ireland* the judgments of the *Irish* courts are properly pleadable as *records*. And Lord *Ellenborough* C. J. said, that such records were now

(*a*) Vide 23 *Geo.* 3. *c.* 28. explaining and enforcing the st. 23 *Geo.* 3. *c.* 53.

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brought before the Houſe of Lords of the United Kingdom on appeals and writs of error, though no longer returnable into this court by certiorari. But his Lordſhip, addreſſing himſelf to the defendant's counſel, aſked what anſwer could be given to the laſt cauſe of demurrer aſſigned? For though the *Iriſh* judgment be a record, yet being only proveable by an examined copy on oath, the verity of the evidence could only be tried by a jury, and not by the Court; and therefore the concluſion ſhould have been to the country.

Lawes, in ſupport of the plea, (as to this, which was the principal point made in argument,) ſaid, that the judgments of the *Iriſh* courts being admitted to be records ſince the Union, muſt be taken to be and pleadable as ſuch, with all legal conſequences, as the records of other courts within this part of the kingdom: and ſuch pleas have always been pleaded with a verification. The caſes of *Walker* v. *Witter* (*a*), and *Galbraith* v. *Neville* there cited (*b*), which were actions of debt on foreign judgments, where the plea of nul tiel record was ſaid to be a nullity, do not apply.

The Court all agreeing that the objection to the concluſion of the plea was well founded, for the reaſon before ſtated, gave

Judgment for the Plaintiff.

(*a*) *Dougl.* 1.

(*b*) *Ib.* 5, 6. It is there ſtated that the rule for a new trial in *Galbraith* v. *Neville* was made abſolute. But according to my note of the caſe, it ſtood over from *Eaſter* 29 to *Mich.* 31 *Geo.* 3. for the Court to adviſe upon it, when Lord *Kenyon* C. J. ſaid, that the Court had conſidered the matter, and were all of opinion, that no new trial ought to be granted. He added, that, without entering into the queſtion how far a foreign judgment was impeachable, it was at all events clear that it was primâ facie evidence of the debt; and they were of opinion that no evidence had been adduced to impeach this; and therefore diſcharged the rule.

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Friday, Nov. 16th.

SMITH *against* M'CLURE.

A bill of exchange payable to the *order* of *A.* is payable to *A.*, without alleging any order made, and it is sufficient to declare that *A delivered* the bill to the defendant, which he *accepted*, and by reason of the premises and according to the custom of merchants became liable to pay the contents to *A.*; without alleging a *re-delivery* of the bill by the defendant; for if a re-delivery, or something tantamount to shew the assent of the drawee to charge himself, be necessary to an acceptance, the demurrer, by admitting the acceptance, impliedly admits the re-delivery, &c.

THE plaintiff declared upon a bill of exchange, dated 1st *December* 1802, drawn by himself upon the defendant at two months for 134*l.* *payable to his own order*, and that he delivered the said bill to the defendant, which he upon sight thereof *accepted* according to the custom of merchants; *by reason of which said premises* and according to the said custom and law of merchants the defendant became liable to pay to the plaintiff the sum specified in the said bill, &c. and being so liable the defendant promised to pay, &c. To this there was a demurrer assigning for special causes, 1st, that although it is alleged that the plaintiff delivered the said bill of exchange to the defendant before his acceptance thereof, yet it is not alleged, nor does it appear that he ever re-delivered the same to the plaintiff. 2. That it is not alleged nor does it appear that the plaintiff did not make any *order* for the payment of the said bill to any other person, or that he ever made any *order* for the payment of it to himself.

W. Walton in support of the demurrer, as to the first objection said, that it did not appear by the declaration but that the defendant had kept the bill when it was delivered to him; and as it was drawn by the plaintiff himself, it never was of any value while in his hands, nor could become so till re-delivery by the acceptor, by which he finally consented to charge himself with the payment of it. And secondly, that being drawn payable only to the *order* of the plaintiff, and not *to him* or *his order*, and no order by him being stated to have been afterwards made, he shewed no title in himself to recover. But

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Lord ELLENBOROUGH C. J. ſaid, there was nothing in either of the objections. That the acceptance of the bill, which was admitted by the demurrer, and muſt be taken to be a perfect acceptance, veſted a right in the drawer to ſue upon it; and if after ſuch an acceptance the acceptor improperly detained the bill in his hands, the drawer might nevertheleſs ſue him on it, and give him notice to produce the bill, or on his default give parol evidence of it. And as to the ſecond ground of objection, a bill payable to a man's own order was payable to himſelf, if he did not order it to be paid to any other; and no ſuch order appearing, it muſt be preſumed that none was made (*a*).

Per Curiam, Judgment for the Plaintiff.

(*a*) Vide *Frederick* v *Cotton*, 2 *Show*. 8. S. P. and *Fiſher* v. *Pomfret*, 12 *Mod*. 125. and *Cunningham's Law of Bills of Exch*. 66.

The KING *againſt* DOUGLAS.

Friday, Nov. 16th.

A ſeaman ſerving in the merchant ſervice is not exempt from being impreſſed becauſe he is a freeholder.

ERSKINE applied for a writ of habeas corpus to bring up the body of the defendant, who had been impreſſed and taken on board one of his Majeſty's ſhips of war. He moved this on an affidavit, ſtating that the defendant, who was ſerving as a mate on board a merchant veſſel, was at the time of his being impreſſed ſeiſed of a freehold eſtate of the annual value of 56*l*., which had been ſome time before bequeathed to him, and of which he was in poſſeſſion of the rents and profits. He ſaid that he was not prepared to ſtate any direct authority that a freeholder was not liable to be impreſſed; but that *Good*'s caſe (*a*) at leaſt ſhewed that it was a matter of doubt;

(*a*) 1 *Blac*. *Rep*. 251.

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doubt; and confidering the importance of the confequences in a general view, it was well deferving of mature confideration before fuch an exemption was negatived. There the writ was moved for on an affidavit that the party was in poffeffion of a freehold eftate of 26*l.* a-year; but it not being negatived that he was a feafaring man, the Court defired to have that point cleared up; and it being fworn the next day that he was only a ship-carpenter, and never ufed to the fea, the writ was awarded. But, in order to obviate any mifconftruction, the Court declared that they had given no opinion as to the poffeffion of the property not being of itfelf fufficient to procure the man's difcharge. But

The Court, being fatisfied, upon inquiry, that the defendant was actually engaged in the merchant fervice at the time he was impreffed; and being anfwered in the negative to a queftion, whether there were even a dictum in the books in fupport of a freeholder's claim of exemption from the imprefs fervice, who in other refpects was a fit fubject for it, faid that they faw no ground for granting the writ.

Writ denied.

Wednefday, Nov. 21ft.

The KING *againft* CUNNINGHAM and Others.

Iron mines are not rateable to the relief of the poor; and being rated conjointly with coal mines, the coal whereof was raifed by the owner of the lands for his own ufe in fmelting the iron, the order of Seffions confirming fuch rate generally, without afcertaining the proportion at which each was rated, was quafhed.

UPON the appeal of *Cunningham* and others, iron mafters, and co-partners, againft a rate made for the relief of the poor of the parifh of *Bedwelty*, at the Seffions holden for the county of *Monmouth*, the rate was

confirmed

confirmed ſubject to the opinon of this Court on the following caſe: 1804.

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Meſſrs. *Cunningham* and Co., who are leſſees and occupiers of a large tract of land in the pariſh of *Bedwelty*, and of ſeveral mines of iron ore and coal under the ſame, were aſſeſſed in the rate as follows: "For the farm and lands 32*l.* For the iron and coal mines 70*l.*" The iron ore and coal which they raiſe is applied ſolely to the manufacturing of iron in furnaces built for that purpoſe, part of which is raiſed under the farms and lands rated, and part under the mountains. Meſſrs. *Cunningham* and Co. objected to the rate on the following grounds; Firſt, That having been charged for part of the ſurface, they ought not to be ſeparately charged for minerals under that ſurface. Secondly, That iron mines are not aſſeſſable to the poor's rate. Thirdly, That the coal itſelf, being raiſed for making iron, is alſo not liable to be aſſeſſed.

Dauncey (and *Abbott* was to have argued on the ſame ſide) in ſupport of the order of Seſſions, beginning by obſerving, that it could not be contended on the part of the defendants, who appealed againſt the rate, that coal-mines were not rateable,

Lord ELLENBOROUGH C. J. ſaid, that it was likely they would contend, and that with ſucceſs, that iron-mines were not rateable: and that though the coal-mines were rateable (concerning which it could make no difference whether the coal were ſold by the owner to another who uſed it in an iron-foundery, or whether he applied it himſelf to the like purpoſe), yet being rated conjointly with ſomething elſe which was not rateable, and the Court

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here having no means to afcertain the feveral proportions, fo as to rectify the excefs of the rate, they could do nothing elfe than quafh the order of Seffions, which had confirmed the rate generally, fuch order being at all events wrong.

Dauncey thereupon admitted that he could not fupport the rate in toto, as iron-mines were not rateable, not being named, as coal-mines are, in the ftat. 43 *Eliz. c.* 2.: but he fuggefted, as the rate was good for the farm and lands, and for the coal-mines, that it might be fent back to the Seffions to afcertain the proportion at which the iron-mines were rated, and amend the rate by ftriking out fo much. But

Gibbs, contrà, faid, that it would be as eafy to make a new rate as to amend the former. And

The Court faid, that as the order of Seffions was certainly wrong in affirming the rate fo framed, there was no objection to quafh it.

Order of Seffions quafhed.

Saturday, Nov. 24th.

The KING *againft* WATSON.

Where a corporation were feifed in fee of lands, which by the cuftom were annually meted out under their control by a leet jury, according to a certain ftint, to fuch of the refident burgeffes who chofe to ftock the fame; they paying 19s. 4*d*. to each of the other burgeffes who did not ftock: held that the burgeffes who fo ftocked were *tenants in common* of the lands fo occupied by them, and as fuch *occupiers* were liable to be rated for the fame.

JAMES WATSON, an inhabitant, and occupier of a houfe in the parifh of *St. Mary*, in the borough of *Huntingdon*, in the county of *Huntingdon*, appealed to the Quarter Seffions for that borough againft a poor's-

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rate of the ſaid pariſh, dated the 9th of *May* laſt, objecting, by his notice of appeal, to the rate, becauſe *E. Howſon*, *R. Thompſon*, and *C. Garner* were not rated for certain common lands, called the Mill Common and Pitts, ſituate in the ſaid pariſh of *St. Mary*, in, over, and upon which ſaid lands the ſaid *Howſon*, *Thompſon*, and *Garner* have certain commonable rights for feeding and depaſturing their cattle, according to the cuſtom of the ſaid common and common lands, according to their reſpective rights as commoners uſing the ſame; and which ſaid lands, ſo called the Mill Common and Pitts as aforeſaid, are in the reſpective occupation of the ſaid *Howſon*, *Thompſon*, and *Garner*, for the purpoſe of enjoying the ſaid commonable rights, and from which they actually do derive a local, viſible, and beneficial advantage, by ſtocking, uſing, and feeding the ſame with their commonable cattle reſpectively, and therefore ought to be rated for the ſame. Upon hearing this appeal the juſtices confirmed the ſaid rate, ſtating the following caſe for the opinion of this Court: "That the mayor, aldermen, and burgeſſes of the borough of *Huntingdon* are the owners or proprietors of certain large tracts of land within the ſaid borough, uſed as a common of paſture, and ſtocked by ſuch reſident burgeſſes of the ſaid borough in right of their burgerſhips as think proper to ſtock, according to a ſtint annually fixed by the leet jury, who are burgeſſes of the borough, under the control of the mayor for the time being; part of which lands, namely the Mill Common and Pitts mentioned in the notice, are in the pariſh of *Saint Mary*, and part in other pariſhes in the ſaid borough. That no part of the ſaid common was ever aſſeſſed to the poor's-rate. That there are about 80 reſident burgeſſes who have rights of common, ſome of whom ſtock to the full of

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their rights, others partially, and ſome do not ſtock at all; but in the latter caſe receive an annual payment of 19*s.* 4*d.* in lieu thereof, which is paid by thoſe who do ſtock. That the ſaid *Howſon*, *Thompſon*, and *Garner*, the perſons named in the notice of appeal, are burgeſſes, having right to ſtock the common, and who did ſtock in the courſe of the year 1804."

Gibbs and *Wilſon*, in ſupport of the Order of Seſſions. It does not appear that any of the perſons, the omiſſion of whom in the rate is complained of, are actual inhabitants of or occupy excluſively any lands within the pariſh of *St. Mary;* and therefore the objection is reſolvable into this, that certain perſons reſident in another pariſh have not been rated for an incorporeal right, ſuch as a right of common is, which they exerciſe within the pariſh. But there is no inſtance of the rating of any ſuch right; nor is it warranted by the ſtat. 43 *Eliz.*; and the rating it would be attended with practical inconveniences. The only caſe where the attempt has been made is *R.* v. *Aberavon* (*a*), which was recently decided; but there the Seſſions had quaſhed the rate in which the common land was omitted: and all that this Court decided was, that the land yielding profit was rateable in its nature; without determining the queſtion of occupancy, whether the corporation who were ſeiſed in fee of the land, and who permitted poor perſons and others to ſtock it, or the perſons by whom it was ſo ſtocked, were to be conſidered as the occupiers to be rated. There too the perſons occupying it ſtocked to an indefinite amount; here according to a certain ſtint fixed by the leet jury. It is therefore

(*a*) Ante, 453.

nothing

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nothing more than a verbal permiſſion to theſe perſons to turn on a certain number of cattle for a year. Taking it however to be a right exerciſed by grant, it is not annexed to real property, but a grant of a ſtinted right of common in groſs for a year. Now the ſtat. 43 *Eliz. c.* 2. has no words to comprehend perſons having ſuch a right as this. The only deſcription which can apply to them is "*occupiers* of lands;" but they could not maintain treſpaſs againſt a wrongful intruder, and therefore they cannot be *occupiers* in the legal ſenſe of the word, who muſt be in poſſeſſion of the land itſelf. A *cattle-gate* (*a*) indeed has been holden to be a tenement, the occupation of which would enable a perſon to gain a ſettlement; but that gives a title to the ſoil, and the intereſt paſſes by leaſe and releaſe. Then the numbers intereſted, with the minuteneſs and complexity of the intereſt to be rated, are material to be conſidered in the deciſion of a new queſtion. The numbers here intereſted amount to 80, and muſt in many inſtances be indefinite. Where large commons run into different pariſhes, all the perſons who ſtock will be liable to be rated proportionably in each, when in many inſtances the intereſt muſt be very minute, and not capable of being divided ſo as to be the ſubject of rating. By the ſame rule a right of digging ſtone or turf, or getting ſand, will be rateable, and the omiſſion of every trifling intereſt will be the ground of an appeal. If land ſo applied be rateable at all, it would be leſs inconvenient to rate it in the hands of the corporation who are ſeiſed of the freehold; though many difficulties of another ſort would preſent themſelves againſt ſuch a rating. In *R.* v. *Jolliffe* (*b*), one who had a way-leave over another's land, which was an enjoyment of the ſoil

(*a*) 1 *Term Rep* 137. (*b*) 2 *Term Rep.* 90.

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in a particular mode, was holden not rateable for it, though it were a thing of value and let for a large rent; because the occupier of the land over which it passed was rated for it, and the land could not be rated twice. That indeed was said to be only an *easement*; but there is no magic in words. And in *R.* v. *Bell and others* (a), where the occupiers of such way-leaves were deemed rateable, it was because the land itself was conveyed to them. In the former case the owner of the land was, from the nature of the thing, excluded from any actual enjoyment of so much of it as was appropriated to the way-leave; and yet he was deemed to be the occupier in law. So here, if there be any occupier, it must be the corporation. And it was settled in *R.* v. *Gardner* (b) that a corporate body is rateable.

Erskine and *Best* contrà. The case of *The King* v. *Aberavon* is in point to shew that property of this description must be rated, and that a rate omitting it altogether was properly quashed. [Lord *Ellenborough* C. J. The Court decided nothing in that case upon the question of occupancy. All that we determined was, that we could not say that the Sessions had done wrong in quashing a rate, when a large track of land beneficially occupied was wholly omitted to be rated.] There it was uncertain by what right the several persons stocked the common; but here there is a distinct occupation stated in the several resident burgesses, who have their respective rights individually allotted to them by the leet jury, and who have in fact a beneficial enjoyment of the land of a determinate value. It is immaterial by what title they claim the possession of the land; it is sufficient that they are in the

(a) 7 *Term Rep.* 598. (b) *Cowp* 98.

actual

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actual beneficial occupation of it. If an officer of a corporation be entitled in virtue of his office to a distinct occupation of a tenement or land, he, and not the corporation, must be rated for it. So of any other public officer (a). The corporation as such could have no right to occupy in this case after the personal occupation by stint was settled by the leet jury amongst the individual resident burgesses. The right is exercised here by a definite number of known persons, and not as in the *Aberavon* case by an indefinite, unknown, and fluctuating body. The value of this right is a subject of calculation, and divisible. Each of those who stock pay 19*s.* 4*d.* to those who do not. A right of this sort may be considered as a tenement; as a common in gross was holden to be in *R.* v. *Dersingham* (*b*) and the enjoyment of it is an inhabitancy in law. And every occupier of land is rateable, though he be not actually resident within the parish. The ability to maintain trespass is not the criterion of being liable to be rated in respect of the property. The impropriator of tithes is rateable, who cannot be said to occupy them, and cannot maintain trespass. [*Lawrence* J. Tithes are rateable by the express words of the statute 43 *Eliz.* But the question is very different where the party, if rateable at all in respect of the land, must be rated as *occupier.* Occupation, properly speaking, implies *possession* (*c*), and trespass can only be brought by him who is in possession of the land.] Then the burgesses who stock must be considered as in possession, since they have a right in exclusion of all others. If there were only one

(*a*) Vide *Eyre* v. *Smallpace*, 2 *Burr.* 1059. *R.* v. *Munday and Others*, 1 *East*, 584.; and *Rex* v. *Terrott*, 3 *East*, 506.

(*b*) 7 *Term Rep.* 671.

(*c*) Vide *Jones* v. *Mansel*, *Doug.* 302.

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who ſtocked, he would be in the actual and ſole poſſeſſion of land of the admitted value of nearly 80*l.* a-year, for which it would be impoſſible to contend that he would not be rateable, however his title to it were derived; then it cannot make any difference that the number of thoſe who ſtock is greater, the value being diviſible.

Lord ELLENBOROUGH C. J. The whole cloud which has been caſt over the caſe ariſes from a miſconception of the nature of the property occupied by theſe perſons. It has been reſembled to an incorporeal hereditament; but it is no ſuch thing. The corporation are the owners in fee of the land, and they dole it out annually, according to the cuſtom, to certain of the burgeſſes; ſuch of them as take it paying a certain ſum to thoſe who do not turn on any ſtock. Then when the number of perſons who ſtock it is aſcertained, what is there to diſtinguiſh them from other tenants in common? Each of them might maintain treſpaſs for an injury done to his occupation in common. It has been decided that a common in groſs is a tenement, and it ſhould ſeem from thence to follow that it is rateable: but without conſidering that, this caſe ſteers clear of all difficulty; for I do not conſider this as an incorporeal hereditament, but as a corporeal tenement, of which the ſeveral burgeſſes who ſtock are tenants in common. And we cannot ſay that an enjoyment of land which is of ſuch value as that thoſe who do not actually enjoy it, but who might if they ſo pleaſed, are entitled to a compenſation from thoſe who do, is not ſomething which is rateable; and being rateable, it muſt be rated in the hands of thoſe who have the beneficial poſſeſſion of it.

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GROSE J. This is in truth a queſtion whether the occupiers of land are rateable for that land. The portion of each is indeed ſmall, but that can make no difference. This is common land belonging to a corporation who deal it out annually amongſt certain of the burgeſſes, and when they are aſcertained, they are tenants in common of the land. Then have they any thing worth rating? It is ſtated, that there are 80 in number of them, and that each of thoſe who do not ſtock receives annually 19*s.* 4*d.* in payment from thoſe who do. This ſhews that thoſe who do ſtock have a beneficial enjoyment of the land, for which they think it worth while to pay ſo much.

LAWRENCE J. This is the caſe of certain perſons, who, having, as I underſtand the caſe, the excluſive enjoyment of land for a year for the purpoſe of turning on their cattle, are to be conſidered as tenants in common of it. The corporation are the owners of the land; the burgeſſes it ſeems are by the cuſtom entitled to have it divided amongſt certain of them every year, according to a certain ſtint ſettled by the leet jury: when it is ſo meted out to them, they are tenants in common. I think it would be very difficult, after the land was ſo meted out, to ſay that the corporation could maintain treſpaſs for any injury done on the land to the rights of theſe perſons; becauſe if that were ſo, it would ſhew that the corporation were in the occupation of it. For as I ſaid before, treſpaſs can only be maintained by thoſe who are poſſeſſed of the land. But, according to what I collect from this caſe, the reſident burgeſſes are the occupiers.

LE BLANC J. It appears that there is a large track of commonable land, yielding profit, and the objection made

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is, that the commoners by whom it is ſtocked have not been rated for it. Then how does the caſe ſtand? The corporation are the owners of it. How is it enjoyed? Not by the corporation as a body; but it is every year meted out by them, according to the cuſtom, amongſt certain of the burgeſſes, by whom it is to be enjoyed for one year. It appears from hence, that the ſee is veſted in the corporation for the benefit of the reſident burgeſſes. It is meted out annually to ſuch of theſe as chuſe to ſtock, and thoſe, who do not, receive a compenſation from the reſt. Thoſe perſons then are the actual occupiers of it. It is improper therefore to call it a right of common; becauſe it is holden in fee by the corporation for the benefit of the reſident burgeſſes. The corporation themſelves, as a corporation, have no benefit from the land, but the reſident burgeſſes to whom it is meted out annually by the leet jury. This view of the caſe avoids the difficulty ſtated in the argument of rating perſons having a right of common running into ſeveral pariſhes: for this is a caſe of perſons having an equitable right to the land, the fee of which is veſted in the corporation for their benefit.

Per Curiam, Let the rate be ſent back to the Seſſions to be amended by the inſertion of the burgeſſes occupying the land.

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Where a verdict was taken for 10*l.* in trespass, subject to an award of damages, and *the costs to abide the event*; if the arbitrator find less than 40*s.* damages the plaintiff cannot have his costs, though it be also found that the trespass was *wilful*, and that the defendant should pay the plaintiff his costs: for costs being directed to abide *the event*, means the *legal* event; and the authority of a judge to certify for costs under the stat. 22 & 23 Car. 2. c. 9. where the trespass is wilful is not transferred to the arbitrator under such a rule of reference.

I[illegible]king and entering the plaintiff's close [illegible] his corn growing there, with the defe[illegible]try, on not guilty pleaded, it was agreed at [illegible] that a verdict should be taken for the plaintiff [illegible] 10*l.* damages, subject to the award of an arbitrator, and the costs to abide the event. The arbitrator afterwards awarded 10 shillings damages, but also found that the trespass was wilful, being after notice, and that the defendant should pay the plaintiff his costs. The damages however being reduced below 40*s.*, and there being no certificate of a Judge under the stat. 22 & 23 *Car.* 2. *c.* 9. that the trespass was wilful, the Master doubted whether he had authority under this direction of the arbitrator to tax the plaintiff his costs. Whereupon

Clarke and *Reader* moved that the Master might be at liberty to tax the plaintiff his costs. They admitted that the case of *Swinglehurst* v. *Altham* (*a*) pressed against them; but endeavoured to distinguish it from the present by observing, that in that case the arbitrator who had awarded under 40*s.* damages was silent as to the costs, which therefore properly followed the legal event: whereas here the arbitrator has expressly found the trespass to be wilful, and directed the defendant to pay the costs. Either then this was a case within the stat. 22 & 23 *Car.* 2. *c.* 9. and the certificate of the arbitrator, who is put in the place of the judge, is equivalent to a certificate of the judge himself that the trespass was wilful: or it is a case wholly

(*a*) 3 *Term Rep.* 138.

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beside that statute, being one where no certificate could be granted, and therefore the plaintiff would still be entitled to his costs under the statute of *Gloucester*; as in the case of an execution of a writ of inquiry in trespass, where though the damages be assessed at less than 40*s*. the costs follow. They observed also that the two cases cited in *Swinglehurst* v. *Altham*, and on which the Court relied, did not warrant the general conclusion drawn from them, that the arbitrator's award of the trespass being wilful was not tantamount to a Judge's certificate under the statute. For they were not cases of trespass, and in neither did the arbitrator assume to certify. In one of them the plaintiffs against whom the award was made were executors, and therefore not liable to costs: and in the other the sum found to have been originally due to the plaintiff was under 40*s*., and therefore in no event could he have had costs. And (in answer to a question put by the Court, how it could appear by the record that the trespass was wilful so as to warrant them in giving judgment for costs, when the verdict as entered on the roll would appear to be for damages under 40*s*.,) they observed, (in which they were supported by the Master,) that the granting of a certificate by the Judge is never entered on the roll.

Lord ELLENBOROUGH C. J. It is to be regretted that no provision was made in the rule of reference for the event which has happened, of the arbitrator's finding the damages to be under 40*s*., but that the trespass was *wilful*, in which case a Judge's certificate, if the cause had been tried and the same conclusion come to before the court, would have carried the costs. We have however the authority of a decided case that an arbitrator is not in this respect substituted in the place of a Judge, to whom

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alone the ſtatute has given the power of certifying for coſts. Then the caſe ſtands as a verdict for 10*s.* damages, without a certificate; and the coſts being by the rule of reference to abide *the event*, muſt be taken to mean the *legal* event; and therefore the plaintiff cannot have coſts.

Per Curiam, Rule refuſed.

RIGHT, on the Demiſe of W. FISHER, S. NASH, and J. HYRONS, *againſt* ANN CUTHELL.

Monday, Nov. 26th.

Where a leaſe for 21 years contained a proviſo that in caſe either landlord or tenant, or their reſpective heirs and executors, wiſhed to determine it at the end of the firſt 14 years, and ſhould give ſix months' notice in writing *under his or their reſpective hands*, the term ſhould ceaſe; held that a notice to quit, ſigned by *two* only of *three* executors of the original leſſor, to whom he had bequeathed the freehold as joint tenants, expreſſing the notice to be given *on behalf of themſelves and the third executor*, was not good under the proviſo, which required it to be given under the hands of all three; neither could ſuch notice be ſuſtained under the general rule of law, that one joint tenant may bind his companions by an act done *for his benefit*; for non conſtat that the determination of the leaſe was for the benefit of the co-joint tenant; which it was incumbent on the party who wiſhed to avail himſelf of it to prove. And the notice to quit being ſuch as the tenant was to act upon at the time, no ſubſequent recognition of the third executor will make it good by relation: nor was his joining in the ejectment evidence of his original aſſent to bind the tenant by the notice.

THIS was an ejectment to recover poſſeſſion of twelve certain meſſuages and the appurtenances in the pariſh of *St. Botolph, Aldgate*, in the county of *Middleſex*. The firſt count was on the demiſe of *Fiſher, Naſh*, and *Hyrons*: the ſecond on the demiſe of *Fiſher* and *Naſh* only, which latter it was admitted could not be ſupported. The premiſes conſiſted of houſes, formerly the property of one *Moſes Adams*, and by him demiſed by a leaſe dated 20th of *October* 1789 to one *William Cuthell*, (ſince deceaſed, whoſe repreſentative the defendant is) for a term of 21 years commencing from *Michaelmas* then laſt paſt. In which leaſe was contained a *proviſo* that in caſe either landlord or tenant, or their reſpective heirs, executors, &c. ſhould be deſirous at the expiration of the firſt 7 or 14 years of the term to determine the leaſe, and ſhould give ſix months previous " notice in writing *under his or*

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their respective hand or hands to or for the other or others, or for the heirs, executors, &c. of the other or others of them, then the term should cease." *Adams* afterwards died, having made his will, wherein he appointed *Fisher*, *Nash*, and *Hyrons* his executors (*a*), who proved the will. Six months previous to the expiration of the first 14 years, (*Hyrons* one of the executors being at that time abroad,) *Fisher* and *Nash* by a notice in writing dated 23d of *March* 1803, reciting the indenture of lease of the premises to *W. Cuthell* for 21 years, and the proviso abovementioned; and reciting further that *Moses Adams* had in his lifetime made his will and appointed *Fisher*, *Nash*, and *Hyrons* his executors, and that they had proved the will and taken on themselves the execution thereof, and were still executors of the same, proceeded thus: " Now the said *W. Fisher* and *S. Nash* do *on the part and behalf of themselves and the said J. Hyrons* hereby give you (the defendant) notice that they are desirous and do intend at the expiration of the first 14 years of the said term of 21 years to determine the said lease. And they do further *for themselves and the said J. Hyrons* require and demand of you the possession of all the premises at the expiration of the first 14 years, &c. and give you notice to quit and deliver up the possession thereof at that time accordingly." Signed " *W. Fisher* and *S. Nash*." At the trial of this case before Lord *Ellenborough* C. J. at the last *Westminster* Sittings, the plaintiff proved his case by producing the original lease, with the proviso; the death of *Adams*; his will, whereby the lessors of the plaintiff were appointed his executors; the possession of the defendant under *W. Cuthell* deceased;

(*a*) It was admitted that the messuages were freehold, and that the executors who had a power to sell took as joint tenants in fee.

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and the abovementioned written notice to quit, ſigned by two only of the executors, the other being abroad; but no authority was proved from the latter to the other two, to enable them on his behalf to determine the leaſe, further than as it might be preſumed by law from the circumſtances of the notice itſelf, and the ejectment having been brought in the name of the three. It was objected however by the defendant's counſel, that no ſuch preſumption could be made, and that as the executors were joint-tenants under the will, the two could not bind the third by ſuch an act as this, without his concurrent aſſent at the time, and that no ſubſequent ratification of the third, even if ſuch appeared, (which was denied) would be ſufficient to bind the defendant. His Lordſhip being of this opinion nonſuited the plaintiff. It was moved on a former day in this term to ſet aſide the nonſuit, on the ground that the notice itſelf, purporting to be given by the authority of all three of the executors, muſt be taken to have been ſo until the contrary were proved. That it need not have been ſigned by either of them; for if delivered by a common agent or ſteward, as by their authority, it would have been ſufficient, without proving ſpecifically his warrant from each of them individually. But that if there were any doubt of the authority, the act of the two was recognized by the third, in his permitting the ejectment to be brought in his name without any complaint made on his behalf to the court, that his name had been uſed without his aſſent. And the caſe of *Wilkinſon* v. *Colley* (*a*) was referred to, where a receiver appointed by the Court of Chancery for the benefit of infant deviſees, ceſtuy que truſts, was holden to be an agent *lawfully authorized* to give notice to a tenant to quit, and in de-

(*a*) 5 *Burr.* 2694.

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fault to make him liable to pay double rent, within the stat. 4 *Geo.* 2. *c.* 28. *f.* 1. in an action brought in the name of the trustee who had been decreed by that court to account, &c.

Gibbs and *Espinasse* now shewed cause against the rule. The executors, who took this estate as joint-tenants under the will (which was admitted), could not act by a majority, but were all bound to join in the notice in order to determine the lease under which the defendant claims: and no authority was shewn from *Hyrons* to the other two to determine it. [Lord *Ellenborough* C. J. The rule of law is this, as laid down in *Rud* v. *Tucker* (*a*), that every act done by one joint-tenant for the benefit of himself and his companion shall bind the other; but not those acts which prejudice the other. The only question therefore for consideration is, whether the giving notice to determine the lease, whereby the joint-tenants are to acquire possession of the estate, be such an act as must necessarily be a benefit to the third joint-tenant, or whether it may prejudice him?] Then nothing appears from whence the Court can collect whether the determination of the lease will be a benefit or a prejudice to *Hyrons*. It is matter of individual judgment resting in the opinion of those who are to give the notice. If the rent reserved be an adequate one, and the tenant responsible, it might fairly be considered by him as prejudicial. And if it be only doubtful, the two joint-tenants have no right to elect for the third. And if on the return of *Hyrons* from abroad he would have a right to disaffirm the notice, it follows necessarily that the defendant could not be bound by it at the time; for the lease being entire,

(*a*) Cro. Eliz. 803.

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the lessee was not bound to take notice to quit two-thirds of the estate. He is entitled to hold all the premises, if bound to hold any of them. Then he is not bound to accept any notice which is not binding upon all his landlords as well as upon himself; for it must be such as he can with certainty act upon at the time; and therefore if the notice to quit may be disavowed afterwards by one, no subsequent recognition of his can make it good; because in truth it only becomes his notice from the time of the recognition. If the tenant were bound to quit at a certain time by a notice which is binding upon those from whom he derives title, he of course would lay out no more upon the premises than would suffice under his lease for the period when his occupation is to cease; whereas if the term were continued for 7 years longer, it might be necessary or convenient for him to expend larger sums, and do other acts within the period between the notice to quit and the expiration of the 14 years, in order to profit by his subsequent occupation of the premises. Then the notice in this case does not even profess to state that the two executors had authority from the third to determine the lease; but only that they for themselves and the third give notice, &c. The case of *Wilkinson* v. *Colley* (*a*) does not apply; for there the receiver appointed by the Court of Chancery had the authority of that Court for letting the premises, and had been acknowledged by the tenant himself as acting in the place of the original trustee, and he had before received rent from the tenant in that character.

(*a*) 5 *Burr.* 2694.

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Erſkine and *Marryat* in ſupport of the rule. The notice to quit purports to be given by the authority of the three executors, and muſt be taken ſo to be, at leaſt till the contrary be proved: more eſpecially when it is followed up by the action of ejectment brought upon the demiſe of the three; which is not merely to be taken as a ſubſequent recognition, (which might be ſubject to the objection taken), but as evidence of a prior authority from the third executor who was abroad. But further, the very nature of the act done furniſhes a preſumption that it is beneficial to the abſent joint-tenant; for it is to put an end to a long leaſe holden at the original rent, and to reſtore to him the poſſeſſion of the eſtate. This is again ſtrengthened by the tenant's reſiſtance to the ejectment; by which he proves his own ſenſe of the benefit of the leaſe to the poſſeſſor of the land, and the benefit of poſſeſſion to the owner muſt be in the ſame proportion. And this is confirmed to be the opinion of the abſent joint-tenant himſelf, by permitting the ejectment to be brought in his name. At any rate, the intereſt of the three executors being apparently the ſame, the Court will not conclude that an act which appeared to be beneficial to the two was prejudicial to the third, without ſome evidence to ſhew ſuch a diſtinction. For all acts done by parties, having a general authority to act on the ſubject matter, muſt be preſumed to have been rightly done until the contrary be ſhewn. Here the notice given on behalf of all three is legal on the face of it, and it lies on the defendant to ſhew that *Hyrons* did not conſent to it in the firſt inſtance, eſpecially againſt the evidence of his having ſince acted upon it, as if it had been iſſued by his authority. Notice to quit given by a ſteward or agent has been always deemed

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deemed ſufficient when the act is adopted and acted upon afterwards by the owner, without proving a particular authority at the time. As in *Fitchet* v. *Adams* (a), an entry by a ſtranger, without authority, was holden good to take advantage of a condition broken, if it were aſſented to before the day of the demiſe laid in the declaration in ejectment by the heir at law. [Lord *Ellenborough* C. J. There no third perſon's act was to depend upon the validity of the entry at the time it was ſo made. *Lawrence* J. That caſe goes upon the principle that omnis ratihabitio retro trahitur et mandata æquiparatur. But that cannot apply to a caſe like the preſent, where the tenant was entitled to receive ſuch a notice as he could act upon with certainty at the time.] The tenant could not have been injured if he had acquieſced; for the abſent executor could not have ſhewn that the act done was prejudicial to him.

Lord ELLENBOROUGH C. J. This was a notice to quit given to the tenant under a proviſo in a leaſe for 21 years, that in caſe either party wiſhed to put an end to the term at the expiration of the firſt 7 or 14 years, ſix months previous notice in writing ſhould be given *under* his or *their reſpective hands*. Now this is a notice ſigned by *two* only of *three* joint-tenants, under whom the defendant held, purporting however to be given on behalf of themſelves and the other. It is a notice to defeat an eſtate: the perſon therefore to whom it is given ought to be aſſured at the time he receives it, and when he is to act upon it, that if he deliver up poſſeſſion at the end of the ſix months, he will be acquitted of all further claims in

(a) 2 *Stra.* 1128.

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respect of the remainder of the term. But if *two* only of the *three* joined in the notice, how could the defendant be assured of this? How could he be assured that the third might not disavow the notice afterwards, and claim the defendant still as a tenant to him? But it is said, that *Hyrons* suffering the ejectment to be brought in his name is a ratification of the others' authority. But a ratification given afterwards will not do in this case; because the tenant was entitled to such a notice as he could act upon with certainty at the time it was given; and he was not bound to submit himself to the hazard whether the third co-executor chose to ratify the act of his companions or not, before the six months elapsed. Then the rule of law is relied on to shew that the two joint-tenants who signed the notice had authority to bind the other in this case: and it is asked how the act appears to be *prejudicial* to the third? But it is not necessary for the defendant to shew that it would be *prejudicial* to *Hyrons*. The rule of law is, that every act of one joint-tenant which is *for the benefit* of his co-joint-tenant shall bind him. And it is a condition on the part of those who set it up and would avail themselves of it as binding, to shew that it was *beneficial* to *Hyrons*. For the two joint-tenants had no right to bind the third in his absence, unless the act done appear to have been *for the benefit of all*: and how does that appear? Subsequent acts cannot be brought in aid. It must be done under a competent authority at the time. And in order to satisfy the condition on which the lease was to be defeated, the notice ought to have been given under the respective hands of the three executors.

GROSE J. The tenant who took the entire lease of the whole was not bound to accept notice to quit a part only, but

but ſuch notice only as was obligatory upon all the joint-tenants. Here there was a proviſo in the leaſe, that in caſe either party wiſhed to put an end to it at the expiration of the firſt 7 or 14 years, it ſhould be lawful ſo to do upon giving the other ſix months previous notice in writing under his or *their reſpective hands*. That was not done in this inſtance; for the notice was only ſigned by two out of three of the perſons intereſted, and therefore the tenant was not bound by it.

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LAWRENCE J. I think there is great weight in the argument of the defendant's counſel, that for the notice to be good it ought to be binding on all the parties concerned at the time when it was given, and not to depend for its validity, in part, upon any ſubſequent recognition of one of them: becauſe the tenant is to act upon the notice at the time, and therefore it ſhould be ſuch as he may act upon with ſecurity. But if it be to depend upon a ſubſequent ratification of one of the joint-tenants, landlords, whether or not it is to be binding upon him, the condition and ſituation of the tenant muſt remain doubtful till the time of ſuch ratification. Now the intention of the parties to the leaſe was, that the tenant ſhould not be obliged to quit without being appriſed of it for a certain time, that he might have an opportunity to provide himſelf with another dwelling; but if a ratification will do, inſtead of 6 months, he might not know certainly for as many days or hours whether he muſt quit or not. The rule of law, that omnis ratihabitio retro trahitur, &c. ſeems only applicable to caſes where the conduct of the parties on whom it is to operate, not being referable to any agreement, cannot in the mean time depend on whether there be a ſubſequent ratification.

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But here the intermediate acts of the tenant referable to the terms of his leafe are to be affected by relation.

LE BLANC J. I cannot fatisfy myfelf that the nonfuit was wrong. Here is a power of determining a leafe by the notice to quit of *three* perfons; and *two* only give the notice: then I muft be fatisfied that they had authority to bind the third, before I can fay that their notice was good. And when I fee that by the terms of the provifo the notice is to be given *under their refpective hands*, I cannot fay that a notice under the hands of two only is good. Befides, the tenant is to act upon this notice at the time, and he muft be fatisfied that it is fuch a notice as will bind all the three. No evidence was offered to fhew that the two acted by the authority of the third; and if the defendant had yielded to it, and could not have proved the concurrence of *Hyrons* to it, the latter might afterwards have difavowed the act of his co-joint-tenants, and have come upon the defendant for his rent.

Rule difcharged.

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DOE ex Dem. THOMAS STOPFORD *against* ROBERT STOPFORD.

Tuesday, Nov. 27th.

The word *share* may carry a leasehold estate: As where a testator, having three sons and one daughter, and leasehold estate and personal funds, devised one leasehold estate to his eldest son, and other leaseholds to his second son, directing his executors to receive and apply the rents until they came of age; and then directed a certain sum to be put out at interest for the benefit of his widow durante viduitate, and that on her death or marriage it should be divided equally between his three sons, *share and share alike*; and then he gave his daughter 600*l.* to be paid her when of age; and then gave the residue of his worldly effects to be divided equally amongst his three sons, *share and share alike*; and lastly directed that "if *any* of his said children died under age and without lawful issue, the SHARE of *him* or *her* deceased should go equally amongst his surviving sons:" held, that the word SHARE in the last clause referring, as it must do, to the *whole* share or portion of the daughter, must have the same meaning as to the sons, and must comprise the leasehold as well as personal funds before given to them; and that upon the death of the eldest son under 21, and without issue, the leasehold estate devised to him went equally between the two surviving sons.

EJECTMENT for the moiety of certain premises situate at *Dalton* in the county of *Lancaster*, upon two demises for 14 years; one stated to be made on the 23d of *April* 1799, and the other on the 25th of *March* 1803. Plea, not guilty. At the trial before *Chambre* J. at the Spring Assizes 1804, at *Lancaster*, a verdict was taken for the plaintiff, subject to the opinion of this Court, on the following case;

Richard Stopford, being seised to him and his heirs of an estate pur auter vie in the premises in question, in *May* 1779 died intestate, leaving his widow *Jane*, and an only son, *John Stopford*, who thereupon became in like manner seised of the same estate. *John Stopford* the son had three sons, *Richard* the eldest, *Robert* the defendant, the second, and *Thomas* the lessor of the plaintiff, the youngest, and one daughter. *John Stopford* died so seised in *December* 1779, having by his will dated 1st of *December* 1779, and duly executed, devised as follows: "First, I direct all my just debts, funeral expences, and the probate, &c. of my will to be paid out of my personal estate; and I devise and bequeath all that my messuage and tenement, with the lands, &c. in *Dalton* in the county of *Lancaster*, being leasehold, under *R. W. B.* Esq. and now in the occupation of *W. N.* as farmer thereof, unto my son *Richard Stopford*, to hold the same from and after the decease of

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my mother to him, his heirs, executors, &c. during all the residue of my leasehold estate and interest therein. And I devise and bequeath all that my messuage or dwelling-house and tenement in *Mawdesley* aforesaid, whereat I now live, and the lands, &c. being leasehold under Sir *R. H.*; and also all those my closes, &c. called the closes on *Blackmoor* in *Mawdesley* aforesaid, which I hold by lease under the Earl of *Derby*, unto my son *Robert Stopford*, to hold the same to him, his heirs, executors, administrators, and assigns during all my several and respective estates and interests therein. Provided that my executors, and their executors and administrators shall hold, manage, and dispose of all and every my said messuages, tenements, closes, &c. herein before devised till such time as my said sons to whom the same are given shall respectively attain the age of twenty-one years; and till that time dispose of and apply the clear yearly rents, issues, and profits therefrom arising in manner hereinafter mentioned. And I give and bequeath unto *E. Caunce* and *R. Culshaw* my executors afternamed, their executors and administrators, 340*l.* upon trust that they and the survivor, &c. place the same out at interest, and out of the yearly interest shall pay unto my wife *Elizabeth* 15*l.* a-year during her life (durante viduitate), &c. And if the principal sum of 340*l.* shall make more interest than 15*l.* yearly, I direct that the overplus, as well as the same principal upon my wife's decease or marriage, whichsoever shall first happen, shall go unto and be divided equally amongst my sons, *Richard Stopford* and *Robert Stopford*, and my son *Thomas Stopford*, their respective executors and administrators, *share and share alike.* And I give and bequeath to my daughter *Jane Stopford,* her executors and administrators, 600*l*, to be paid her as soon as she shall

attain the age of twenty-one years. And all the rest, residue, and remainder of my worldly effects not herein before disposed of, I give devise and bequeath to my said three sons *Richard*, *Robert*, and *Thomas*, to be divided equally amongst them, their respective executors and administrators, *share and share alike*, when and as soon as they shall attain the age of twenty-one years. And I direct that the profits and produce of my real and personal estates shall be applied towards bringing up my said children till of age. And I further direct, that if any of my children die under age, and without lawful issue, the SHARE of *him* or *her* deceased shall go equally amongst my surviving sons. And I hereby constitute and ordain the said *E. Caunce* and *R. Cuishaw* my joint executors, &c." *Jane Stopford*, the mother of the testator *John Stopford*, died in *July* 1781. *Richard Stopford*, the devisee of the premises in *Dalton* mentioned in the will, died in *August* 1785, at the age of sixteen years, intestate, and without issue. From the testator's death until the defendant *Robert Stopford*, the next brother and heir at law of *Richard Stopford* the devisee came of age, the executors were in the receipt of the rents, issues and profits of the premises devised to *Richard Stopford*; since which the defendant, *Robert Stopford*, has had the possession of them. The lives upon which the estate is held are still in being. This action is brought by the lessor of the plaintiff *Thomas Stopford*, being the youngest son of *John Stopford* the testator, who attained his age of 21 years on the 22d of *April* 1799, to recover the moiety of the said leasehold estate in *Dalton*, to which moiety he lays claim by virtue of his father's will. The question for the opinion of the Court was, whether upon the construction of the will of *John Stopford*, the lessor of the plaintiff has become entitled to a moiety of the said leasehold estate?

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If the Court ſhould be of opinion that he is, then the verdict to ſtand; if not, then a verdict to be entered for the defendant.

This caſe was argued in *Trinity* term laſt by *Holroyd* for the plaintiff, and *Scarlett* for the defendant, who ſeverally commented upon the different clauſes of the will. The former contended, that in the concluding deviſe in the will, wherein the teſtator directs, that "if any of his children die under age, and without lawful iſſue, the SHARE of him or her deceaſed ſhould go equally amongſt his ſurviving ſons," the word SHARE was intended to carry the leaſehold property ſpecifically deviſed to the two eldeſt ſons reſpectively, in caſe of the death of either before 21, &c. as well as the perſonal funds before bequeathed to them. The latter contending, that the meaning of the word *ſhare* muſt be limited to the reſidue of the perſonal funds only, of which there was ſufficient to ſatisfy it, according to its ordinary conſtruction, and the ſenſe in which it was uſed in other parts of the will. And he intimated that the Maſter of the Rolls had once been of this opinion, when the ſame parties were before him, upon the conſtruction of this will. But in reply it was ſtated, that his Honor had afterwards entertained doubts on the ſubject, and that *Chambre* J., before whom this ejectment was tried, had finally been of opinion with the leſſor of the plaintiff.

The Court then ſaid, it would be proper for them to conſider the caſe more deliberately before they delivered their opinion upon it. And now

Lord ELLENBOROUGH C. J. delivered the opinion of the Court.

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The queftion, whether the leffor of the plaintiff, the youngeft fon, be entitled to a moiety of the leafehold eftates devifed to *Richard Stopford*, the eldeft fon of the teftator, in the event which has happened of *Richard*'s death under age and without iffue, depends upon the meaning of the word *fhare* in this part of the will. Its fenfe, as that of every other word capable of feveral diftinct meanings, is properly to be collected from the context in the place where it occurs. In another part of the will, i. e. where the 340*l.*, and the overplus of intereft after paying thereout 15*l.* a-year to the teftator's wife is fpoken of, and directed to be divided equally amongft his three fons and their refpective executors and adminiftrators *fhare and fhare alike*, the word *fhare* neceffarily means an equal proportion of a *perfonal* fund to be divided amongft them. In the bequeft of the refidue of his worldly effects to his fons and their refpective *executors and adminiftrators*, it means in like manner an equal proportion of a *perfonal* fund. In the laft inftance in which the word *fhare* occurs, (which is the inftance in queftion), after having directed that the profits and produce of his real and perfonal eftate fhould be applied towards the bringing up his fons till of age, the teftator orders that if *any of his children* fhould die under age without lawful iffue, " the *fhare* of him or *her* deceafed fhould go equally amongft his furviving fons." Here the "*fhare* of *her deceafed*" can mean only the entire fortune or portion before given to the daughter under her father's will, i. e. her 600*l.*, for fhe had no participation with her brothers under the will either in the legacy of 340*l.* and the contingent overplus of intereft thereupon beyond the 15*l.* a-year given thereout to the wife, nor in the refidue of worldly effects. If therefore the word *fhare* can only

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mean (as it only can) in reſpect to the daughter *her entire portion or ſhare aſſigned her under the will*, it is reaſonable to give it the ſame meaning in the ſame place in reſpect to the ſons, unleſs the intention of the teſtator to be collected from any other part of the will, or ſome rule of law, ſhould be contravened thereby. But neither of theſe effects follow from giving this conſtruction to the word *ſhare* as applied to the ſons' intereſts under the will. It occaſions indeed, what may be attended with ſome inconvenience, (and a wiſh to avoid which, and a probably preſumed intention in the teſtator on that account, inclined me at firſt to a different conſtruction) i. e. the neceſſity of dividing what is an entire tenement as between the lord and tenant, between two ſurviving ſons, as ſeveral tenants of their reſpective ſhares of the ſame: an inconvenience, in reſpect to the payment of rent, contribution to fines of renewal, and the like, which as far as it exiſts, the teſtator had in the firſt inſtance ſteered clear of, by giving the ſeveral holdings entire to each of his ſons to whom he deviſed the ſame. But upon conſideration I do not feel that this circumſtance can weigh againſt the otherwiſe clear and neceſſary meaning of the word *ſhare* as it occurs in this place. We are therefore of opinion that the leſſor of the plaintiff, the younger brother, is under this word *ſhare* entitled to a moiety of the leaſehold eſtate for lives, which was in the firſt inſtance deviſed to his brother *Richard;* and that the whole thereof does not deſcend to *Robert*, the elder of the two brothers, as heir at law of *Richard:* and of courſe that the verdict in favour of the plaintiff for ſuch moiety ought to ſtand.

Poſtea to the Plaintiff.

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NICHOLSON and Another *against* WILLAN and Another.

Where one delivered goods of *above* 5l. *value* to common carriers to carry *by the mail*, paying no extra price; and by a public notice which had before reached the owner the carriers had declared they would not be accountable for any package *above the* value of 5l., UNLESS insured and paid for accordingly: held, that the goods having been sent by a different carriage and lost, the owner could not recover the value against the carriers; for the loss happened by no tortious conversion nor by a renunciation of their character as common carriers, but only by a negligent discharge of their duty as such. Nor could he recover even the 5l., as by the terms of the notice the carriers stipulated not to be answerable at all for goods above 5l value, unless paid for accordingly.

THIS was an action on the case against the defendants as common carriers, wherein the first count of the declaration stated, that the plaintiffs, on 20th *Feb.* 1803, at *Nottingham*, caused to be delivered to the defendants, and the defendants then and there accepted of the plaintiffs certain goods of the plaintiffs of a certain value, viz. 100*l.*, to be by the defendants carried by the *London* and *Leeds* royal mail coach, which was to depart in the same morning from *Nottingham*, to be delivered to the plaintiffs for certain reasonable hire to be paid to the defendants on that behalf: and that although the said mail coach did on the morning of the day and year aforesaid depart from *Nottingham* for *London*, yet the defendants, not regarding their duty, &c. instead of carrying the said goods by the said mail coach, or delivering the same goods in *London*, &c. wrongfully, and without the licence and against the will of the plaintiffs, carried the said goods from *Nottingham* by a different coach, not being a mail coach, and took such bad care of the said goods that they were lost, &c. The second count stated a general contract to carry the goods from *Nottingham* to *London*, and that they were lost by negligence. The third count stated a special delivery to and acceptance of the goods by the defendants, to be carried from *N.* to *L.* by the mail coach, or if not sent by the mail coach, then to be re-delivered to certain persons at *N.* for the use of the plaintiffs; and then averred a breach of that contract by not sending the goods by the mail and detaining them from those persons at *N.*, and

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afterwards losing the goods by negligence. The fourth count stated a general contract by the defendants to take care of the goods for a certain reward, and that by their negligence the goods were lost. The fifth was a count in trover. Plea not guilty. At the trial before Lord *Ellenborough* C. J. at the Sittings after last term at *Guildhall*, it appeared that the defendants were proprietors of two coaches travelling from *Leeds*, through *Nottingham*, to *London*, the one a mail coach, the other a heavy coach, which went out six hours later every day than the other. The parcel in question, containing goods to the value of 58*l.* was (as a witness for the plaintiffs proved, and which the jury found to be true,) *delivered and accepted to be carried by the mail coach.* It appeared however to have been booked to go by the heavy coach, and to have been afterwards lost, but whether in a course of conveyance by the heavy coach, or out of the warehouse, or how otherwise did not appear. It was proved that the defendants had for some time before put up an advertisement on a board in their office at *Nottingham*, and of which the plaintiffs were also proved to have had notice, in the following terms: "Take notice, that the proprietors of coaches transacting business at this office will not be accountable for any passengers' luggage, money, plate, jewels, watches, writings, goods, or *any package whatever* (if lost or damaged) *above the value of* 5l., UNLESS insured and paid for at the time of delivery, and demanded in one month after such damage was sustained." (Signed by one of the defendants.) The jury found a verdict for the plaintiffs for 5*l.*, subject to the question which was reserved by his Lordship for the opinion of the Court, whether the verdict should stand for that sum, or be entered for 58*l.*, the value of the

 goods,

goods, or whether a nonfuit fhould be entered. A rule nifi having been obtained in the laft term for entering a nonfuit, 1804.

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Erfkine and *Cowley* fhewed caufe againft it, and contended, 1ft, that the plaintiffs were entitled to recover the whole value of the goods, as upon a breach of the fpecial contract laid in the firft count, whereby the defendants, after contracting to fend the parcel by the *mail*, had fent it by another coach. The gift of that contract was, that the goods fhould be fent by a particular mode of conveyance, which the plaintiffs might think was more fafe as well as expeditious than any other, and would on that account be content to ftand their own infurer againft any lofs beyond the 5*l.* which the defendants at all events engaged to make good. The defendants do not in their notice object to *carry* for the ordinary price goods above 5*l.* in value, but they ftipulate that they will not *infure* them from lofs above 5*l.* for that confideration: by this muft neceffarily be underftood loffes arifing from accident or misfortune, which as common carriers they would otherwife be liable to anfwer for at common law, and not fuch as arife from their own wilful misfeazance. Their liability then arifes, not from any implied negligence in the execution of the contract for carrying, but from actual misfeazance in doing an act which put it out of their own power to perform their contract in the manner ftipulated. If the goods had been fent by the mail and loft, the defendants would fo far have performed their contract within the terms of the notice, that at moft they would not have been anfwerable for above 5*l.*: but here there was no inception of the contract of carriage by the mail. The breach of contract therefore is collateral to the notice, and

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the fame as if the defendants had thrown the parcel into the ftreets, where it was loft or deftroyed. As in *Ellis* v. *Turner* (a), a carrier having carried the goods beyond the place where he had ftipulated to leave them, after which they were loft, it was ruled to be a cafe out of his general notice not to be liable beyond 10*l.* per cent., and that he was liable to pay the whole lofs. A pawnee (b) is not liable if the goods be ftolen without his default; but if they be taken from him while ufing them contrary to his contract, he lofes his privilege. But, 2dly, it is not competent to common carriers, fuch as the defendants are, to limit their common law liability by means of general notices. If their reward be not adequate to their rifk, they fhould accept fpecially (c) in each cafe at a rate proportioned to the value of the goods. Carriers have been for fome years gradually encroaching on their general legal refponfibility, and extending from time to time their exemptions till the policy of the common law is entirely defeated. In *Gibbon* v. *Paynton* (d), where fuch notices were firft confidered, the exception was only of *money*, *jewels*, or other like valuables, for carrying which a certain higher rate was demanded. The plaintiff there fent money hid in an old bag of hay; and held that he could not recover for the lofs of the money, becaufe it was a *fraud* upon the carrier. Now the exceptions extend to all goods whatever. In *Doct. & Stud.* 270. *Dial.* 2. *c.* 38. after fpeaking of the general liability of a carrier, it is added, "and if he would per cafe refufe to carry goods unlefs promife were made uuto him that he fhall not be charged

(a) 8 *Term Rep.* 531. (b) *Coggs* v. *Bernard*, 2 *Ld. Ray.* 917.

(c) *Kenrig* v. *Eggleston*, *All.* 93. *Morse* v. *Slue*, 1 *Ventr.* 238. *Tichborne* v. *White*, 1 *Stra* 145.

(d) 4 *Burr.* 2298.

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for no misdemeanor that should be in him, the promise were void; for it were against reason and good manners." The same thing is said in *Noy's Maxims*, 92. And this doctrine was lately confirmed by Lord *Kenyon* in *Hide* v. *The Proprietors of the Trent and Mersey Navigation* (a), who said, that common carriers could not discharge themselves from losses by any act of their own, as by giving notice.

Garrow and *Wigley* contrà. The goods were delivered to and accepted by the defendants in their character of carriers, and the notice which applies as well to the mail as the heavy coach, and was communicated to the plaintiffs, amounts to a special acceptance on the part of the carriers, which the authorities prove may legally be made. Then however an indictment or action might have lain against them for refusing to accept the goods otherwise than specially, yet having so accepted them, they can only be liable on their special contract. If the goods had been lost immediately after such acceptance, the defendants certainly could not have been charged further than the terms of the notice warranted: then it cannot make any difference that they were lost in the progress of their carriage out of the heavy coach. Now by the terms of the notice the defendants expressly refuse to make good at all the loss of goods of the value of more than 5*l.* (as these confessedly were), *unless* insured and paid for accordingly. The plaintiffs therefore, if bound by the terms of the notice, are not entitled to recover even the 5*l.*, as was ruled in *Izett* v. *Mountain* (b). For upon the first count, the plaintiffs fail in proving their allegation that the defendants *accepted* the parcel upon

(a) 1 *Esp. N. P. Cas.* 35. (b) 4 *East*, 371.

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the terms there ſtated, which are not conſonant to the terms of the notice; and this applies to all the other counts ſtating a contract; and the fifth count in trover cannot at any rate be maintained, without ſhewing a wilful and tortious act, by which the loſs happened; of which there is no evidence. For at the moſt, the ſending them by a different coach was no more than an act of negligence: they ſtill acted in their character of common carriers.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. in this term delivered the judgment of the Court; and after ſtating the ſeveral counts in the declaration, and obſerving that as there was no evidence applicable to an alternate contract of the kind laid in the third count, that count may be laid out of the queſtion; and alſo ſtating the ſeveral facts proved at the trial in the manner before ſet forth; proceeded thus:

On the part of the plaintiffs it was contended that they were entitled to recover the 58*l.* the value of the goods, notwithſtanding the notice given by the advertiſement, which excludes from the carriers' general reſponſibility for the ſame at common law all goods above the value of 5*l.* unleſs the terms therein ſpecified, namely, of inſuring and paying for the goods at the time of delivery, ſhould be complied with, and which was not done in this inſtance. The ground on which they ſo contended was that the loſs in queſtion was one not incurred in the courſe of their employment as carriers, but occaſioned by an act of tortious converſion in direct contravention of the terms on which the goods were delivered to and accepted by them. But to found this argument there was

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no other evidence but the mere fact of the booking of the goods for a different coach, and a subsequent non-delivery, which can amount to no more than a negligent discharge of duty in their character of carriers, and not to an entire renunciation of that character and of the duties attached to it, so as to make them guilty of a distinct tortious misfeazance in respect to the goods in question.

It was also contended on the part of the plaintiffs that such a special acceptance of goods by a common carrier as is contained in the defendants' notice is contrary to the policy of the common law, which has made common carriers responsible to an indefinite extent for losses not occasioned by the only excepted causes of loss, viz. "the "act of God and the King's enemies." But considering the length of time during which, and the extent and universality in which the practice of making such special acceptances of goods for carriage by land and water has now prevailed in this kingdom, under the observation and with the allowance of courts of justice, and with the sanction also and countenance of the legislature itself, which is known to have rejected a bill brought in for the purpose of narrowing the carriers' responsibility in certain cases, on the grounds of such a measure being unnecessary, in as much as the carriers were deemed fully competent to limit their own responsibility in all cases by special contract: considering also that there is no case to be met with in the books in which the right of a carrier thus to limit by special contract his own responsibility has ever been by express decision denied: we cannot do otherwise than sustain such right in the present instance, however liable to abuse and productive of inconvenience it may be; leaving to the legislature if it shall think fit

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to apply ſuch remedy hereafter as the evil may require. In the abſence therefore of any evidence to ſupport the plaintiffs' claim as founded upon a ſuppoſed tortious converſion of the goods in queſtion, and of any valid objection in point of law to the ſpecial terms of acceptance contained in the defendants', the carriers', notice, we cannot help giving effect to thoſe terms in the notice; by which, inaſmuch as the goods in queſtion were above the value of 5*l.* and not inſured and paid for at the time of delivery, the plaintiffs are not accountable for the ſame: and of courſe the verdict even for the 5*l.* muſt be ſet aſide, and a nonſuit entered.

A nonſuit entered.

Tueſday, Nov. 27th.

WYNNE and Another *againſt* RAIKES and Others.

A letter from the drawees of a bill in *England* to the drawer in *America*, ſtating that "their proſpect of ſecurity being ſo much improved they ſhall *accept or certainly pay* the bill," is an *acceptance* in law, although the drawees had before refuſed to accept the bill when preſented for acceptance by the holder, who reſided in *England*, and again after the writing ſuch letter refuſed payment of it when preſented for payment; and although ſuch letter written before were not received by the drawer in *America* till after the bill became due.

THE firſt count of the declaration ſtated, that on the 9th of *November* 1801 *Aquila Brown* drew a bill of exchange on the defendants for 500*l.* payable to the order of *Thomas Andrews* and *Butler* at 60 days ſight; that *Thomas Andrews* and *Butler* indorſed the ſaid bill to the plaintiffs; and that the defendants upon ſight thereof, duly accepted the bill. There were alſo counts for money paid, and for money had and received. The defendants pleaded the general iſſue, and at the trial before Lord *Ellenborough* C. J. at the ſittings after laſt *Hilary* term at *Guildhall*, a verdict was found for the plaintiffs for 555*l.* ſubject to the opinion of this Court on the following caſe:

On the 9th of *November* 1801 *Aquila Brown*, who reſides at *Baltimore*, in *North America*, drew the bill of exchange in queſtion at that place upon the defendants, who reſide in *London*, and for a valuable conſideration

paid

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paid the bill to *Thomas Andrews* and *Butler*, residing in *Baltimore*, who afterwards, for a valuable consideration indorsed it to the plaintiffs, who reside in *London*. On the 9th of *November* 1801 *Aquila Brown*, by letter of that date, advised the defendants of having valued on them by divers bills amounting together to 5548*l*. 14*s*. 2*d*. sterling, of which the bill in question was one, the amount of which bills *Aquila Brown* in that letter *requested the defendants to honour with acceptance*, and place the amount to his debit, and which letter of advice was duly received by the defendants. The plaintiffs, on receiving the bill in question in *England*, presented it on the 2d of *January* 1802 to the defendants for their acceptance, but the defendants refused to accept it. On the 13th of *January* 1802 the defendants wrote a letter to *Aquila Brown*, the drawer, which letter, after mentioning some damage which the cargo of the *Chesapeak*, consigned to the defendants, had sustained, and difficulties in which it had been involved; as also an attachment laid upon the property of *Aquila Brown* in the hands of the defendants, (among other things) contains the following passages: "Under these circumstances, while your property in the *Chesapeak* appeared in so very questionable a state that we could not tell what security to rest upon it, you could not expect that we could interfere for any of your bills refused by Mr. *Mangin*, or even accept all the bills of yours which came in upon us. Several of them of course have been noted for non-acceptance, and Messrs. *Finlay, Bannatyne*, and Co. have officiously sent you a protest on that for 551*l*. 15*s*. for non-acceptance. We have however now the satisfaction to mention to you that Mr. *Mangin*, having resolved to pay many of your bills on him, Messrs. *Mellish* and Co. have taken off the attach-

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ment in our hands, and ſince the receipt of Meſſrs. *Muilman*'s letter of the 5th inſtant, our proſpect of ſecurity on the *Cheſapeak* is ſo much improved that *we ſhall accept or certainly pay all the bills* which have hitherto appeared; the one for 6500*l*., the 19th of *October*, has not yet been preſented to us, but we will hope that the ſtate of your funds will likewiſe permit us to take care of that." The bill in queſtion was one of thoſe which had appeared prior to the writing the above letter of the 13th *January* 1802, and which letter was *received by Aquila Brown* in *America* on the 19th *March* 1802. On the 6th of *March* 1802, which was 60 days and three days of grace after the bill in queſtion was preſented for acceptance, the plaintiffs preſented the bill to the defendants for payment; but the defendants refuſed to pay the ſame, and the plaintiffs cauſed it to be proteſted for non-payment. *Aquila Brown*, the drawer of the bill, was at the time the ſame was drawn indebted to the defendants in the ſum of 5000*l*. and hath ſo continued to the preſent time. The queſtion for the opinion of the Court was, Whether the plaintiffs were entitled to recover? If the Court ſhould be of that opinion, the preſent verdict to ſtand; if otherwiſe, a nonſuit to be entered.

Littledale, for the plaintiffs, relied on the caſe of *Clarke* v. *Cock* (*a*) as in point to ſhew not only that an acceptance of a bill may be by parol or collateral writing, but alſo that the terms of the defendants' letter of the 13th of *January* 1802, wherein they ſtate "that the proſpect of ſecurity in the *Cheſapeak* was ſo much improved that they *ſhall accept or certainly pay* all the bills" which had then appeared, did in law amount to an acceptance. In

(*a*) 4 *Eaſt*, 57.

that

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that cafe the acceptance was by letter to the drawer, acknowledging notice of the bill having been drawn, and affuring him that it would meet with due honour from him. The only difference between the two cafes is, that here the letter of the defendants was not communicated to the plaintiffs before the bill became due. But however material that might have been if the letter were to be confidered merely *as a fpecial agreement* to accept or pay the bill, it matters nothing confidering it as in itfelf a legal *acceptance* of the bill; which is a technical term, binding the acceptor equally into whofever hands the bill fhall come, and not merely confined in its operation to the particular perfon to whom the promife was made, or any other to whom it may have been communicated previous to the bill becoming due. If the promife to accept, fo made, were to be confidered only as a fpecial agreement, the liability of the acceptor would be continually varying, according as the bill got into this or the other perfon's hands, who had or had not notice of the fpecial agreement, and who had or had not taken the bill upon the credit of it. According to the known practice and law of merchants, it is fufficient to fix the acceptor abfolutely, if his promife to pay be made to the drawer, who is the fountain-head of the bill, or to the firft indorfer by whom it is put into circulation. When the letter had once paffed out of the defendants' hands, it had its operation, and they had no further concern with the bill than to pay it when due. In the cafe of *Powell and Another* v. *Monnier* (a) the plaintiffs, indorfees, had received the bill before the letter of *Monnier* to the drawer, promifing that the bill fhould be duly honoured, was written, and which was holden to be an acceptance. The plaintiffs

(a) 1 *Atk*. 611.

therefore

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therefore could not have taken the bill on the credit of the letter. So in *Pierson* v. *Dunlop* (a) there was a prior refusal to accept given to the holder, as in this case; yet a subsequent letter to the drawer, saying that his bill would receive due honour was considered as an acceptance: and some expressions to the contrary, attributed to Lord *Mansfield* in one part of his judgment, were noticed by Lord *Ellenborough* in *Clarke* v. *Cock* (b), as clashing with what was said by the same noble judge in *Pillans* v. *Van Mierop* (c), and with other authorities.

Puller, contrà, at first proposed to question whether the letter of the 13th of *January* did amount to a positive promise to pay the bill even as between the drawer and acceptors: but finding the opinion of the Court decidedly against him on that point, he proceeded to distinguish this from the other cases, by observing that here the defendants had expressly refused to the holders, the plaintiffs, to *accept* the bill, and they followed up such refusal, after writing the letter of the 13th of *January* to the drawer, by denying payment. That letter, therefore, can only be taken to be a private engagement to the drawer to *pay* the bill when it became due, upon the supposition that they should then have funds of his in their hands, but accompanied with a direct *refusal to accept* the bill, so as to make themselves liable upon it in the hands of a third person. The promise to pay to the drawer never reached him in *America* till after the bill had become due and had been refused payment. It could not then have any operation. In order to have effect it must have relation to an existing bill, according to *Johnson* v. *Colli*-

(a) *Cowp.* 571. (b) 4 *East*, 70. (c) 3 *Burr.* 1666—9.

ings.

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ings(*a*); and it cannot vary the case whether the promise be made before the bill is drawn, or after it is due and has been refused payment, when the operation of it is spent. In *Beawes' Lex Mercatoria* 454. *pl.* 16. it is said that "if the possessor of the bill hath neglected to demand acceptance before the drawer's failure, and the person to whom it is directed has advice thereof, he cannot be compelled to accept the draft, *though previous to the knowledge of the drawer's misfortunes he had acquainted him with his intention to honour his bill.*" As to the case of *Powell* v. *Monnier*, the defendant, after giving the drawer the promise to accept, kept the bill in his hands ten days previous to the time when it became due, without objection, and then returned it to the indorsees; and for several days after he had so received it the drawer continued solvent; by which laches the acceptor clearly made the bill his own. [Lord *Ellenborough* C. J. It does not appear by the report that that formed any part of the ground of Lord *Hardwicke*'s decision. He went on the ground that the letter was an acceptance.] Here the letter never reached the drawer till after the bill had become due and was refused payment; so that it could not possibly have influenced any person to take the bill. And it is on this ground that a collateral promise to accept was considered by Lord *Mansfield* in *Mason* v. *Hunt* (*b*) as constituting an acceptance. And this was confirmed by *Le Blanc*, J. in *Johnson* v. *Collings* (*c*). Here however the possibility of the promise influencing any third person is negatived by the circumstances of the case.

(*a*) 1 *East*, 98. (*b*) *Dougl.* 299. (*c*) 1 *East*, 105.

Littledale

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Littledale in reply, obferved, that the payees in *America* would act upon the letter when received, and therefore it would influence the conduct of third perfons.

The Court confidered the cafe of *Powell* v. *Monnier* to be in point to the prefent; but as it went fomewhat further than the other cafes, they wifhed to fee if there were any other report of it varying from that in *Atkyns*. Upon this day

Lord ELLENBOROUGH C. J. delivered judgment.

This cafe, in all its material circumftances, refembles that of *Powell* v. *Monnier*, 1 *Atk*. 611., the authority of which has not been, as far as we have been able to find, ever fhaken. The letter of the defendants, ftated in the cafe to have been written on the 13th of *January* 1802 to *Aquila Brown*, the drawer, when the bill in queftion, amongft others drawn by him upon them, had been refufed acceptance, after commenting upon the circumftances which had before made the property of the drawer appear to them, the defendants, to be in a very queftionable ftate, particularly in refpect to what the drawer had in the *Chefapeak*, fays, " Our profpect of fe" curity in the *Chefapeak* is fo much improved that *we fhall* " *accept* or *certainly pay* all the bills which have hitherto " appeared." And the firft queftion in this cafe is, Whether this promife be an *acceptance?* If either branch of the alternative contained in this promife would be an effectual acceptance, if ftanding alone, furely it cannot be lefs fo becaufe the promife is couched in terms of an alternative of which each branch is an acceptance. A promife *to accept* an exifting bill is an acceptance. A pro-

mife

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mife *to pay it* is alfo an acceptance. A promife therefore to do the one or the other, *i.e. to accept* or *certainly pay*, cannot be lefs than an acceptance. It amounts, I think, in effect to this, "Whether we fhall fend for the bill "again, and accept it in form or not, is uncertain, but "at any rate you may depend upon its being paid." Suppofing it to be an acceptance, the time when it is to be confidered as made, namely, Whether at the date of the letter, or at the time when it reached the drawer to whom it was written in *America*, (which was on the 19th of *March* 1802, after the bill had become due), is immaterial, inafmuch as an acceptance after the time appointed for the payment of a bill is good. (*Jackfon* v. *Piggot*, 1 *Ld. Raym.* 364. *Salk.* 127. and *Mutford* v. *Walcot*, 1 *Ld. Raym.* 574. *Salk.* 129, &c.)

The fecond queftion is this cafe is, Whether, inafmuch as the bill was not taken by the holders upon the credit of this promife of the defendants fo made to the drawers, nor was the fame known to them to have been made at all till after the bill was due, they, the holders, can avail themfelves of it as an acceptance? In the cafe of *Powell* v. *Monnier*, already mentioned, that which was holden an acceptance enuring to the benefit of the indorfees, the the plaintiffs, was an acceptance contained in a letter to the drawer, one *Newburgh*, promifing, "that his bill "fhould be duly honoured." The promife, being long fubfequent to the time when the plaintiffs in that cafe became poffeffed of the bill by indorfement, could of courfe have formed no part of their original inducement to take it. And the promife was in that cafe, as well as in this, made to a drawer, who had drawn without having any effects in the acceptor's hands; and it does not appear in the one cafe more than in the other that the holders,

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holders, the plaintiffs, ever knew of the acceptance on which they afterwards relied prior to the time when the bill became due. Without oversetting the authority of the case of *Powell* v. *Mennier*, we cannot say that the plaintiffs are not in the present case, which so entirely resembles it, entitled to recover. And as in adhering to it we violate no principles of commercial convenience, but confirm a rule of law, which we find established on a subject which least of all others endures uncertainty and change, we cannot do otherwise than hold the plaintiffs in this case entitled to recover.

Postea to the plaintiffs.

Saturday, Nov. 27th.

Doe on the Demise of Whitbread *against* Ann Jenney, Widow.

Where a copyholder in fee who had paid a fine on his original admittance, surrendered to the use of himself for life, remainder to his wife for life, remainder over; on which surrender and readmittance no new fine was paid; and by the custom a remainder-man coming into possession on the death of tenant for life must be admitted and pay a fine: held, that such a custom is good; and that on the death of tenant for life, the next in remainder not coming in to be admitted and pay her fine, after proclamations made and presentment by the jury, the lord may seize quousque the tenant comes in, and maintain ejectment to recover the possession in the mean time. And such proclamations being in general terms for *any* person to come in and make title, &c. and the presentment of default being also general, are good, though the person next in remainder were known and named in the surrender.

THIS was an ejectment to recover certain copyhold premises, parcels of the manor of *Usford*, with the members, in the county of *Suffolk*, which was tried before *Hotham* B. at the last assizes at *Bury*, when a verdict was found for the plaintiff, subject to the opinion of this Court on the following case:

In 1787 the lessor of the plaintiff purchased and became, and is now lord of the manor of *Usford*, and the lands in question are parcel of this manor. In 1749 *Edmund Jenney* was admitted in fee to the lands in question; upon whose admission a full fine was paid. On the 4th of *September* 1765 he surrendered the lands to the uses of his marriage settlement, viz. to the use of himself for life, remainder to the defendant, then *Ann Brook*, spinster, for

life,

life, with divers remainders over. On the 10th of *April* 1766 *E. Jenney* was admitted tenant of these lands, to hold to himself for life, "according to the form and effect of the said surrender by the rod, at the will of the lord, according to the custom of this manor, by the rents and services therefore due and of right accustomed, saving every person's right." No fine was paid by *E. Jenney* on his admission in 1766, as tenant for life under the marriage settlement, or assessed or paid in respect to the remainders. In *August* 1801 *E. Jenney* the tenant for life died, and the defendant was called on to be admitted; and thereupon she appeared at a court baron of the manor on the 3d of *December* 1801, and offered to swear her fealty or have it respited; but she refused to be *admitted*, insisting at the same time that she was the lord's tenant by virtue of the surrender and admittance of *E. Jenney*, the prior tenant for life. On this refusal there was a presentment by the homage that *E. Jenney* died seised; and three proclamations were made at three different courts that if *any* person or persons would come into court and make any just claim or title in or to all or any of the lands or tenements holden of the said manor, whereof the said *E. Jenney* died seised, such person or persons should come into court and take admission to the same. And no one coming in to be admitted, a precept was issued by the steward of the manor under his hand, and dated the 11th of *December* 1802, directed to the bailiff of the manor, authorising him in the presence of two or more copyhold tenants of the manor to seize into the hands of the lord, quousque the tenant should come in to be admitted, all such copyhold lands and tenements holden of the said manor by copy of court roll, whereof the said *E. Jenney* died seised, as aforesaid, to and for the

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 use

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use of the lord, quousque the tenant comes in to be admitted: and then the lands are specified under a videlicet. And the lands were accordingly seized by the bailiff into the hands of the lord, in the presence of two copyhold tenants of the manor quousque the tenant should come in to be admitted. And after such seizure the lord made the lease in question, on which the present ejectment is brought. And the jury found, that by the custom of the manor, when a person who has been admitted tenant for life of a copyhold estate holden of the manor dies, the tenant in remainder, whether for life, in tail, or in fee, shall come in to be admitted and pay a fine thereupon. And they also found a verdict for the plaintiff, subject to the opinion of the Court on the following question, viz. Whether, under these circumstances, the plaintiff in the ejectment were entitled to recover the lands in question.

Alderson for the plaintiff, made two points; 1st, That, independent of the custom, the defendant, next in remainder after the death of the tenant for life, was bound, upon his death, to come in and be admitted. But, 2dly, That at any rate she was so bound by the custom, which was a good one. 1. The admittance of tenant for life is so far only the admittance of those in remainder as to vest their estate; but not so as to prejudice the lord in respect of his fine on admission. The statute of limitations, however comprehensive the terms of it, and binding on copyholders, extends not to bar the lord of his fine (*a*). So the stat. 16 *R*. 2. *c*. 5. which made it a forfeiture of land generally to purchase bulls of the pope, does not attach on copyholds, because that would prejudice the

(*a*) Vide 1 *Bac*. *Abr*. 711. in margine.

lord;

lord (*a*). The rule for these expositions is given in *Bacon's Abridgment* (*b*), that where an act of parliament by general words alters any estate, interest, tenure, custom, or service of a manor, or does any thing in prejudice either to the lord or tenant, it shall not extend to copyhold estates; but otherwise where the act is made for the public good, and no prejudice accrues to the lord or tenant. So neither shall the general rule of law, that the admittance of the tenant for life is the admittance of all in remainder, extend to deprive the lord of his fine due on the admission of each individual tenant. But as the fine is only due to the lord on the admission of the tenant, if the remainder-man were not bound to come in and be admitted on the death of tenant for life, the lord would be deprived of his fine. Lord *Coke* (*c*) therefore lays down the general rule with this limitation, that "if a copyhold be surrendered for life, remainder to a stranger; though the admittance of tenant for life be sufficient to invest the estate in him in remainder, *yet upon the death of tenant for life, he in remainder shall be admitted, and pay a fine.*" And this is confirmed by Lord C. B. *Gilbert*, in his book on Tenures, 194.; and indeed it would be incongruous that where the first taker takes for life only, the next taker on his death should not be admitted and pay his fine, when he would be bound to do so if the first taker had taken in fee. The cases agree in this distinction; for in *Auncelm* v. *Auncelm* (*d*) the question being only as to the title between two contending

(*a*) *Co. Copyh.* 149. (*b*) 1 Vol. 711.

(*c*) *Co. Copyb.* 157. *f.* 56. Ld. *Coke* concludes in the same manner as to an heir, (*f.* 41. *p.* 115.) "that an admittance is principally for the benefit of the lord *to entitle him to his fine*, and not much necessary for the strengthening of the heir's title."

(*d*) *Cro. Jac.* 31.

tenants,

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tenants, the admittance of tenant for life was holden to be the admittance of him in remainder. But in the *Earl of Bath* v. *Abney* (a), which was a cafe between lord and tenant, it was determined that the executor of a termor was bound to be admitted, and that the lord was entitled to a fine upon fuch admittance. The queftion there was, Whether a fine were due on every change of tenant, or only on every change of eftate? and it was confidered that on every change of tenancy the fucceeding tenant was compellable to be admitted, though claiming under the fame title as the antecedent one, becaufe a fine was due to the lord on every fuch change, and to entitle him to it, it was neceffary that the tenant fhould be admitted. 2dly. At all events the cuftom found is obligatory upon the defendant to come in and be admitted. Cuftom is the foul and effence of a copyhold, and determines the law of it. There is nothing unreafonable in the cuftom, nor inconfiftent with the nature of the eftate granted. Till admittance the tenant was not entitled to the lord's protection; and it is a reafonable confideration for it that he has thereby a certain place for affuring his title. And if the lord be entitled to his fine in refpect of the premifes, it is reafonable that he fhould have the means of enforcing the payment of it by a feizure of the premifes quoufque the tenant comes in and is admitted. In many inftances the lord cannot tell who is the next in remainder till he comes in.

Beft, contrà, after obferving that this was more a queftion between the tenant and the fteward, than between the lord and tenant; for that the latter did not decline her fealty, but had offered it, and only objected to pay-

(a) 1 Burr. 206.

ing

ing a fine as for a new admiſſion, when ſhe conſidered that ſhe was already admitted tenant upon the rolls of the manor; contended, 1ſt, That by the general law of copyholds, the true rule of which was to be collected from *Brown*'s caſe (*a*), and from *Barnes* v. *Corke* (*b*), the admittance of tenant for life is the admittance of him in remainder, though by ſpecial cuſtom two fines may be due. That conſequently, if the tenant were already admitted, this ejectment cannot be maintained; but the lord has another remedy for his fine. The paſſage therefore cited from Ld. *Coke*'s Copyholder requiring the *admiſſion* of him in remainder ſtands alone, and has no authority cited in ſupport of it (*c*). And the caſe cited of *Auncelm* v. *Auncelm* (*d*) is expreſs that the admittance of the tenant for life is the admittance of him in remainder *without any other admittance.* But at any rate a new admittance can only be neceſſary, if at all, in caſes where the remainder is to a man's *right heirs*, or in the like caſes where he who is to take next was not before deſignated upon the lord's roll, and where conſequently the lord cannot tell who his tenant is from whom he is to have ſuit and ſervice, until he has come in and been admitted by name. Such was the caſe of the *Earl of Bath* v. *Abney* (*e*) where the ſurviving truſtee, who was named as tenant, being dead, the lord had no tenant on whom he could

(*a*) 4 *Rep.* 23. *a.* and vide *Gyppen* v. *Bunney*, *Cro. Eliz.* 504.

(*b*) 3 *Lev.* 308.

(*c*) Vid. *Co. Copyh. Supplement*, *p.* 28. ſ 7. cites *Deil* v. *Higden*, *Moor*, 358. which goes to ſhew, that without a cuſtom the lord is not entitled to a new fine from the remainder-man: though Lord *Coke* ſays it is otherwiſe of him in reverſion. And then according to the caſe of *Tipping* v. *Canning*, *Moor*, 465. which was afterwards referred to by the Court, where the lord is to have a fine, there muſt be a new admittance.

(*d*) *Cro Jac.* 31.

(*e*) 1 *Burr.* 206.

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call till the admittance of the executor of the last tenant, whose name was then for the first time put upon the roll. Then, 2dly, a custom to admit one who is already admitted tenant is absurd and unreasonable, and repugnant to the nature of copyhold; in like manner as a custom to surrender by attorney or out of court is void *as a custom*, because by the general law of copyhold it is incident to the tenure to do such acts. Then the custom stated is also void for uncertainty, in not defining any time within which the admission is to be taken, and before which time the lord could not proceed to compel the tenant to come in. He also objected, 3dly, to the regularity of the proceedings; and contended, that this being a case of forfeiture was not to be encouraged, but that the proceedings should be construed strictly. [*Per Curiam.* It is no *forfeiture* but only a *seizure quousque*, to compel the tenant to come in and be admitted.] If the admittance of the tenant for life be by the general law the admittance of him in remainder, the seizure should have been, not pro defectu tenentis, but for the non-payment of the fine. Then the next tenant being known and named in the rolls, the proclamations and the presentment should have been against her by name, the first requiring her personally to come in, the latter presenting her personal default. And such is the usual practice where the next taker is known. He also referred to *Kitchen of Courts*, 244. 4th edit.

Alderson in reply, said, that the case of *Barnes* v. *Corke* (*a*) shewed at least that a fine might be due by custom on the admission of a remainder-man; and here the jury have found such a custom. Then as to the irregu-

(*a*) 3 *Lev.* 308.

larity

larity of the proceedings, the custom need not fix any time for the next in remainder to come in, and then he must come in within a reasonable time after the death of the tenant for life; and that is after the usual proclamations. And no prejudice can arise to the tenant; for, as was said by L.J. *Kenyon* in *Rex d. Tarrant* v. *Hellier* (*a*) the seizure is merely to compel the tenant to come in, and the lord can only retain the possession quousque. Then as to the generality of the proclamations and presentment, it was sufficient in a court baron as in other courts to make general proclamation for all persons bound to attend to come in, there is no occasion to proclaim each absentee individually, whether known or not.

Lord ELLENBOROUGH C. J. adverted to the case of *Tipping* v. *Bunning*, *Moor*, 465., which had not been mentioned, where it was adjudged, that if a copyhold be granted to one for life, remainder to another in fee, the admittance of the tenant for life is the admittance of him in remainder; the reason given for which is, that the lord is not to have a new fine upon the death of the tenant for life; *but where the lord is to have a fine, there must be a new admittance.*

Best observed, that the necessity of a new admittance was not stated so strongly in the report of the same case, in *Cro. Eliz.* 504. by the name of *Gyppen* v. *Bunney.*

The case stood over for consideration; and now

Lord ELLENBOROUGH C. J. delivered the judgment of the Court.

(*a*) 3 *Term Rep.* 162.

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In this caſe two queſtions have been made; the firſt and principal of which is, Whether the defendant, who claims a copyhold eſtate, the ſubject of this ejectment, under a ſurrender made on her marriage to the uſe of her late huſband *Edmund Jenney* for life, remainder to herſelf for life, was, on the death of her huſband, bound to come in and be admitted; there being a cuſtom in the manor that where a tenant for life dies, the tenant in remainder ſhall come in to be admitted and pay a fine? The 2d queſtion is, Whether the preſentment that *E. Jenney* died ſeiſed, and the proclamations made, "that if any perſon would come into court and make juſt claim or title to the lands whereof *E. Jenney* died ſeiſed, ſuch perſon ſhould come into court and take admiſſion to the ſame," be ſufficient; inaſmuch as the defendant, being deſignated by the ſurrender as the perſon to take in remainder on the death of *E. Jenney*, was not named in the preſentment or proclamations? The defendant in this caſe does not object to paying the fine due by the cuſtom from the perſon to whom the eſtate is limited in remainder; but contends that the admiſſion of her huſband was in law the admiſſion of herſelf, and that any further admiſſion is nugatory; and that a cuſtom requiring one already admitted to be admitted again is unreaſonable and void. To ſhew that the admiſſion of the tenant for life is the admiſſion of thoſe in remainder, *Brown*'s caſe, 4 *Rep.* 22 *b.* was relied on, in which the doctrine is laid down, *that the admittance of the tenant for life is the admittance of him in remainder to veſt the eſtate in him, but not to bar the lord of his fine;* and *Auncelm* v. *Auncelm*, *Cro. Jac.* 31. where a ſurrender having been made by a copyholder to *Martha* his wife for life, remainder to *Matthew* his ſon in fee; on which *Martha* was admitted; and *Matthew* the ſon

without

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without other admittance having surrendered to the use of the plaintiff, the Court determined in his favour against the heir of *Matthew*; being of opinion, that the admittance of the feme was the admittance of him in remainder; as the particular estate and that in remainder made in law but one estate. And this last case was much relied on to shew, that the admission of the tenant for life is fully and completely the admission of him in remainder when designated on the roll, as in the present case the defendant is. On the other hand it was insisted, that where by custom a fine is to be paid by the remainder-man, he is in such case bound to be admitted, according to the doctaine of Lord *Coke* in his Treatise on Copyholders, 130, adopted by Lord C. B. *Gilbert*, in his Treatise on Tenures, p. 194: and that the case of *Auncelm* v. *Auncelm* only proves that the admittance of tenant for life is *the admittance of the tenant in remainder, so far as to vest in him the estate in remainder*, and enable him to convey a title to it, but that it is not such an admission as to make him full and complete tenant to the lord. And further, that though it should be holden that, where there is no custom, the remainder-man need not be admitted; yet the present defendant was bound to be admitted, there being such custom within this manor, which is the life of copyholds: and that the custom is a reasonable one; as by means of it it will appear distinctly upon the rolls of the manor to whom the different copyholds belong, and the lord will be better able to call for his fines and enforce his suits and services. In addition to the cases mentioned by the plaintiff's counsel, that of *Gyppen* v. *Bunney*, as reported in *Moor*, 465. may be added; where it is laid down, that if a copyhold be surrendered to one for life, remainder to another in fee, *if the lord is to have a fine from the remain-*

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der-man there is occasion for a new admittance. But without deciding, whether that be necessary without a custom, we think such custom good for the reasons suggested by the counsel for the plaintiff; and it is analogous to what is the law of copyholds, as it respects the heir, who upon the descent of the customary estate may surrender to the lord to the use of another before admittance, and who on the death of his ancestor is immediately tenant by copy of court roll: the reason of which, as assigned by Lord *Coke* in *Brown*'s case, 4 *Co.* 22 *b.* is because the copy made to his ancestor belongs to him, as the admittance of tenant for life is the admittance of him in remainder: and yet according to Lord *Coke*, in his Copyholder, p. 94, the heir is not complete tenant before admittance to all intents and purposes; for till then peradventure he cannot be sworn on the homage, nor maintain a plaint in the nature of an assize.

In support of the second objection no authority has been cited, but it has been rested wholly in what was said to be the usual practice in courts baron of mentioning in the presentment and proclamations the name of the person, when known, who ought to come in and be admitted. If the tenant, when known, were likely to be prejudiced by not being named, this objection would have weight. And though as the object of the presentment is for the information and instruction of the lord, it would in respect of him be better to mention the person who ought to come and be admitted, when known; yet in respect to the heir or remainder-man, this is not the purpose of the presentment, nor are the proclamations intended to inform persons of their titles, but to give notice to those who have a right to be admitted, that the tenancy is vacant, and that the lord requires of those who are entitled to take

upon

upon them the tenancy: and it ſeems ſufficient, ſo far as the tenant is concerned, if the preſentment and proclamations be in the general terms uſed on this occaſion. For theſe reaſons we think there ſhould be judgment for the plaintiff. 1804. DOE d. WHITBREAD *againſt* JENNEY.

Poſtea to the Plaintiff.

WIGGINS *againſt* STEPHENS.

Tueſday, Nov. 27th.

Bail may render without juſtifying; and where the rule expires in vacation, a render on the firſt day of the enſuing term ſedente curiâ is good, though notice were not given till afterwards on the ſame day, and after a writ of procedendo had iſſued to an inferior court where the cauſe originated.

MARRYAT obtained a rule to ſhew cauſe why the writ of procedendo iſſued in this cauſe to the Judges of the palace court ſhould not be ſet aſide for irregularity with coſts. The cauſe having been removed by habeas corpus into this court, ſpecial bail was put in, and a rule obtained in the vacation for better bail, which the defendant had till the firſt day of this term to comply with, when the bail attended to juſtify; but being rejected in a prior cauſe, they did not juſtify in this, but rendered the defendant, ſedente curiâ; which render was lodged with the proper officer of the palace court and allowed, and notice of it given to the plaintiff's attorney about 7 o'clock in the evening; before which time, viz. about 4 o'clock, after the riſing of the Court, the writ of procedendo had been ſued out.

Lawes ſhewed cauſe, and contended that the render was not complete till notice, which ought therefore to have been given ſedente curiâ; the rule to render having expired in the vacation, and the bail having only by indulgence till the riſing of the Court on the firſt day of term to complete the render. But by

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Lord ELLENBOROUGH C. J. The bail, though unable to juſtify, were ſufficient to render their principal (*a*); and having till the laſt moment of the ſitting of the Court to do ſo, the notice muſt neceſſarily be given afterwards; and having the whole day to give notice, if it be given any time in the day it is ſufficient.

Per Curiam, Rule abſolute (*b*).

(*a*) *Edwin* v. *Allen*, 5 *Term Rep.* 401. S. P.

(*b*) Vid. *Tidd's Pract.* 150 which mentions the ſame point ruled in H. 26 *Geo.* 3. and vid. ib. 190.

Wedneſday, Nov. 28th.

BINGHAM *againſt* SERLE.

When the ſtat. 43 *Geo.* 3. *c.* 55. *ſ.* 10. enabled a jury to aſſeſs a compenſation to the owner or perſons intereſted in land, which was taken poſſeſſion of by government; which compenſation was to be made "for the poſſeſſion or uſe thereof *during the time for which the ſame ſhould be required for the public ſervice*;" held that the aſſeſſment of a compenſation only *in groſs*, and without reference to time, as by an annual rent, was bad; becauſe of the uncertainty of the period for which the land would be required, of which no probable average eſtimate could be formed pending the exigency.

ASSUMPSIT for money had and received, and upon an account ſtated. Plea non aſſumpſit. At the trial before Lord *Ellenborough* C. J. at the ſittings at *Weſtminſter* after the laſt term a verdict was found for the plaintiff for 14,780*l.*, ſubject to the opinion of the Court on the following caſe:

The plaintiff is the incumbent of the chapelry of *Goſport*, and the perſon named in the warrant and inquiſition after mentioned. The defendant is receiver-general of the land-tax for the county of *Southampton*. On the 18th of *November* 1803 a warrant was ſigned, and iſſued by two of his majeſty's deputy lieutenants for the ſaid county, directed to the ſheriff thereof, ſtating that "whereas his majeſty had authoriſed the maſter general and principal officers of his majeſty's ordnance to ſurvey and mark out the piece of land ſituate at *Goſport*, in the pariſh of *Alverſtoke*, in the county of *Southampton*, holden by the Rev. *R. Bingham*, under leaſe from the Lord Biſhop of *Wincheſter*, and alſo the parcel of land granted by him for the purpoſe of erecting a dwelling-houſe, &c. for the reſidence of the

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incumbent of *Gosport* chapel, together with such dwelling-house, &c. (and mentioning also certain other lands in the occupation of other persons, under lease from the Bishop of *Winchester*), the same being wanted for his majesty's service: and whereas they the undersigned, two of the deputy-lieutenants, &c. had pursuant to the statute in such case made issued their warrants under their hands and seals commanding possession of the said premises to be delivered to Col. *John Eveleigh*, the commanding royal engineer at *Portsmouth*, for the public service; they therefore required the sheriff to summon a jury to appear at *Gosport*, &c. on a certain day, to *inquire of and ascertain the compensation which ought to be made for the possession or use of the abovementioned premises "during the time for which the same should be required for the public service,"* to the several persons interested therein, and to whom the same ought to be paid." In pursuance of this warrant an inquisition was taken before the sheriff on the 28th of *November*, at the place and by the jurors therein named; whereby the jurors found "that the Rev. *R. Bingham* was entitled to receive 14,780*l.* as a compensation for his damages by reason of giving up the premises therein mentioned to be required from him *for the exigency of government, during the time the same shall be so required*, to be paid *to him for his own use*; and to the further sum of 470*l.* as incumbent of the chapelry of *Gosport*, to be paid to the said *R. Bingham*, to the Lord Bishop of *Winchester*, and to the Rev. *J. Sturges*, LLD. *as trustees* for the benefit of the incumbent of the chapelry of *Gosport* for the time being: (and then it proceeds to find the compensation due to other lessees of the bishop for their damages sustained.) Which several sums the jurors found ought to be paid to the several persons aforesaid immediately

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upon demand thereof for the purpofes aforefaid." The cafe then ftated, that a certificate of the inquifition was figned by the faid two deputy lieutenants, and was on the 30th of *November* ferved, together with the inquifition and warrant annexed, upon the defendant, who was required by the plaintiff to pay the fum of 14,780*l*. That the defendant at that time had money in his hands, as fuch receiver-general, fufficient to difcharge the fame, and promifed to write to his deputy, and that there fhould be no delay in the payment. [Upon the fuggeftion of the Court during the argument, that the act of parliament required certain preliminary fteps to be taken, which did not appear on the face of the cafe to have been purfued, the cafe was afterwards agreed to be amended by inferting the following facts.] That the officers of the Board of Ordnance were duly authorifed by his majefty to furvey and mark out the premifes mentioned in the feveral warrants and certificate after mentioned, and to treat and agree with the perfons having any intereft therein for the poffeffion or ufe thereof, *during fuch time as the exigency of the fervice fhould require*. That in purfuance of fuch authority the premifes of the plaintiff in the faid warrant mentioned were duly furveyed and marked out, and a treaty was duly entered into with the plaintiff for the purpofe aforefaid. That the plaintiff refufed to enter into fuch contract touching the fame as was fatisfactory to the faid officers. That the faid officers of the Board of Ordnance did thereupon require two of the deputy lieutenants for the county of *Southampton* to iffue their warrant according to the form of the ftatute, &c. to put his majefty's officers into immediate poffeffion of the faid premifes. That in purfuance thereof, on the 14th of *November* 1803 a warrant was figned and iffued by them, directed

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to and served upon the plaintiff, and others holding or renting the parcels of ground therein mentioned, stating that " Whereas his majesty had authorised the master-general, &c. of the ordnance to survey and mark out the parcel of land situate at *Gosport*, &c. holden by the Rev. *R. Bingham* under lease from the Lord Bishop of *Winchester*, and also the parcel of land granted by him for the purposes of erecting a dwelling-house, &c. for the residence of the incumbent for the time being of *Gosport* chapel, together with such dwelling-house, &c. the same being wanted for the public service: and that whereas the undersigned, two of the deputy-lieutenants, &c. pursuant to the statute, certified that the possession or use of the said premises was necessary for the public service *during such time as the exigency of the service should require:* they therefore required and commanded the plaintiff, &c. to deliver the immediate possession of the said premises to Col. *John Eveleigh*, &c. or other his majesty's officers appointed by him for that purpose, for the public service." That a certificate was also signed by the said deputy-lieutenants on the same day, stating that " Whereas his majesty had authorised the master-general, &c. of the ordnance to survey and mark out the lands in question, (describing them) holden by the Rev. *R. Bingham* under lease from the Lord Bishop of *Winchester*, &c. the same being wanted for the public service; they therefore certified, that the possession or use of the said premises *was necessary for the public service, during such time as the exigence of the state should require*, pursuant to the stat." &c. That under the said warrant possession was taken by the officers of government of all the premises therein mentioned, except of the dwelling-house, which by consent of the Board of Ordnance the plaintiff was allowed to occupy as tenant

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at will to the ſaid board upon his undertaking to quit immediately upon notice for that purpoſe. The queſtion for the opinion of the Court was, whether the plaintiff were entitled to recover? If he were, the verdict was to ſtand; if not, a verdict was to be entered for the defendant.

The caſe was argued on a former day of this term by *Scarlett* for the plaintiff, and *Gaſelee* for the defendant. The argument turned on the conſtruction of the ſtat. 43 *Geo.* 3. *c.* 55. *ſ.* 10. and reference was alſo had to *ſ.* 11. which was amended by ſtat. 43 *Geo.* 3. *c.* 96. And the principal grounds of contention on the part of the defendant were ſhortly theſe; that a *groſs* ſum (ſuch as had been given by the jury in this caſe) could not be a proper compenſation for a temporary poſſeſſion of uncertain duration, depending upon the *exigency of the public ſervice*, of which no probable computation could be made, there being no criterion by which it could be meaſured. 2dly, That the Biſhop of *Wincheſter*, who was intereſted in the compenſation to be given, was not a party to the proceeding before the jury. 3dly, That it was uncertain on the face of the inquiſition what intereſt the public took in the premiſes, in reſpect of which the compenſation was awarded. To which it was anſwered, in ſubſtance, that the duration of life and other uncertain periods, the value of good-will in houſes for trade, and other contingencies, were daily the ſubject-matter of computation, and verdicts were often founded thereon. That the queſtion of value was a matter of fact; and that after verdict the intereſt of the plaintiff muſt be taken to have been juſtly valued. 2dly, That it was no fault of the plaintiff if all the perſons intereſted were not brought before the jury,

jury, as he was merely passive in the proceeding, which was compulsive upon him on the part of government. That government might have agreed with the lord for his compensation; or if not, that compensation might still be made to him if he shewed a grievance. But that the jury might have considered, that the injury from the temporary possession compensated was too remote to reach the lord. 3dly, That the act did not require the inquisition to state what interest the government took in the premises; and on the contrary, the whole proceeding was founded on an assumption of the uncertainty of the time for which it would be necessary to take the land. It was sufficient that the inquisition pursued the act of parliament, and was as certain as that.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court.

This was an action for money had and received, brought under the stat. 43 *Geo.* 3. *c.* 55. by a lessee of the Bishop of *Winchester*, of a piece or parcel of land situate at or near *Gosport*, against the receiver-general of the land-tax for the county of *Southampton*, to recover the sum of 14,780*l.*, which had been (as alleged by the plaintiff) duly assessed by a jury, as a compensation to the plaintiff for his damages by reason of giving the possession and use of that piece of land "*during the time for which the same should be required for the public service.*" The 10th clause of the act, upon which the claim is founded, and in conformity to which the assessment of compensation is stated to have been and can alone really be made, enacts, "that it shall be lawful for his majesty, &c. to authorise any officer, &c. to survey and mark out any piece of ground wanted for the public service, and to treat and agree with the

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the owner thereof, or any person having any interest therein, for the possession or use thereof during such time as the exigency of the service shall require. And in case the owner, &c. shall decline to enter into such contract touching the same as shall be satisfactory to such officer, &c. or shall be unable, &c., it shall be lawful for the person so authorised by his majesty, &c. to require two or more deputy-lieutenants, &c. to put his majesty's officers into immediate possession of such piece of ground, &c., and shall for that purpose issue their warrant, &c., and shall also issue their warrant to the sheriff, &c. to summon a jury, &c. to inquire of and ascertain the compensation which ought to be made for the possession or use of such piece of ground during the time for which the same shall be required for the public service to the several persons interested therein, and to whom the same ought to be paid: the verdict of which jury shall be certified by such deputy-lieutenants, &c. to the receiver-general of the land-tax, &c. where such lands shall lie; which receiver-general, &c. shall out of any money in his hands pay such compensation to such person or persons in such manner and for such purposes as by such verdict shall be directed," &c.

Three objections have been taken to the plaintiff's right to recover the compensation which has been thus assessed. 1st. That a gross sum (as this appears to be) cannot be a proper compensation for a temporary possession of uncertain duration. 2dly. That all the proper parties interested in the compensation to be assessed were not before the jury. 3dly. That it is uncertain on the face of the inquisition what interest the public take in the premises in respect of which the compensation is awarded. The validity and effect of this inquisition merely depends

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on its conformity to the powers and provifions of the act under which it was taken: it can neither be helped or impugned by any intendment to be drawn from any extrinfic matter. If the inquifition be not conformable to the powers and provifions of the act, it conftitutes no obligation on the part of the receiver-general to pay the money affeffed thereby, and of courfe lays no foundation for the implied promife, upon which this action fhould be fupported.

As to the firft of thefe objections, that a grofs fum cannot be a proper compenfation for a temporary poffeffion of uncertain duration; it is not only true that a compenfation proportioned to and meafured by the time during which the occupation on the part of the public fhould continue is a better mode of compenfation for a poffeffion of uncertain continuance than the affeffment of a grofs fum, but the latter feems to be upon principle, and in all cafes radically vicious. If I fhould affefs a compenfation upon a fuppofition that the exigency will terminate immediately, I may give far too little: if I calculate that it will laft to a very diftant period, I may give greatly beyond the mark; if I divide the difference, I place myfelf in the medium only between two extremes of fimilar injuftice: but ftill I am not morally fure of doing juftice or any thing near juftice, only I have a chance of doing lefs injuftice than if I adopted either extreme. Perhaps a grofs fum, by way of immediate compenfation for the mere immediate damage and inconvenience of removal or the like, and which occurs at once, and a payment afterwards, either annually or at certain fixed periods of time as long as the individual fhould be kept out of his property, would be the beft mode of compenfation. But a compenfation only in grofs, and without any reference to

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time, for an occupation which may either terminate immediately, or laſt for an indefinite length of time, which has not any circumſtances connected with it upon which an average eſtimate of its probable continuance, and a valuation calculated accordingly, may be formed; as the average duration of human life affords towards an eſtimate of the value of a life annuity or the like; but which reſts upon the mere duration of public exigency under all the various uncertainties to which not a calculation merely, but even a conjecture on ſuch a ſubject is liable; I ſay a compenſation ſo adjuſted cannot in its principle be otherwiſe than erroneous. If any proſpective eſtimate in the ſhape of a groſs ſum can be right, I admit that we muſt aſſume the ſum aſſeſſed by this verdict to be that ſum; but as long as the public exigency continues, and which may laſt indefinitely, it is always liable to be wrong; and till the exigency be paſſed can never be proved to be right. Can it be ſaid therefore that what is always liable to be wrong, and can never, (as at preſent whilſt the exigency continues it never can,) be proved to be right, is not fundamentally defective? The moſt that can be ſaid in favour of ſuch a mode of aſſeſſment is, that by accident it is barely poſſible that the ſum total of the ſeveral portions of compenſations, aſſeſſed according to time, might in the reſult happen to amount to the very ſame ſum as is now aſſeſſed in groſs. But the bare poſſibility of its happening to be right will not make the ground upon which it is decided leſs objectionable. If ſeveral numbers were written down by jurymen, and put into an hat, the jury may draw out that very ſum upon paper, and accordingly pronounce their verdict for that very ſum which upon a juſt conſideration of all circumſtances, if they had conſidered them, might have turned out to be the

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the moſt proper amount of damages which they could have found. But would a verdict, ſo right by accident, be itſelf right, or could it be ſuſtained for a moment? A Judge either deciding at hazard or by a vicious rule, licet æquus ſtatuerit, haud æquus fuerit. The amount of damages aſſeſſed by a rule ſo vicious as that of compenſation in groſs is, and which can only be right in an event which is barely within the limits of human poſſibility to happen, muſt be wrong: and if ſo, it is leſs material to diſcuſs at large either of the two other remaining grounds of objection.

Upon the 2d of them however it may not be amiſs to add, that the 10th ſect. of the act in terms directs a jury to be ſummoned "to inquire of and aſcertain the compenſation which ought to be made for the poſſeſſion "and uſe of the ground during the time for which the "ſame ſhall be required for the public ſervice, to the "ſeveral perſons intereſted therein, and to whom the "ſame ought to be paid." And although in this inſtance the warrant of the two deputy-lieutenants for ſummoning the jury ſpecified as it ought to do the abovementioned objects of their inquiry; and although it alſo expreſsly ſtated on the face of it that the piece of land in queſtion, for the uſe of which during the public exigency the compenſation was to be made, was holden by the Rev. *R. Bingham*, the plaintiff, under leaſe from the Lord Biſhop of *Wincheſter*; ſo that it appeared that there were in the very terms of the act "ſeveral perſons intereſted therein," namely, the leſſor, the Biſhop of *Wincheſter*, as well as the plaintiff, the leſſee; yet the jury have by this inquiſition found the compenſation for *R. Bingham*, the plaintiff, only, and have directed the ſame to be paid to him for his own uſe, without either compenſating

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the reverſionary intereſt of the Biſhop of *Wincheſter* therein, or declaring that from its inſignificance in value on account of the length of the exiſting term they had conſidered it as an intereſt not requiring any, or at leaſt any ſubſtantial compenſation. The length of the term is however no where ſtated; and it does not appear with certainty that recourſe can be had under this act a ſecond time to a jury to inquire of and aſcertain a compenſation for an intereſt which, though known to them to exiſt, was omitted to be compenſated under the firſt inquiſition; the poſſibility of which at leaſt ought clearly to appear in order to excuſe and obviate the conſequences of ſuch an omiſſion. I admit that if the reverſion of the biſhop was, as has been ſuppoſed in argument, a reverſion at the expiration of ſome extremely long term, that it would be very difficult to aſſign any juſt compenſation by a ſum in groſs for the remote and contingent uſe of the land during the period of ſuch reverſion. However, even upon this ſuppoſition, a compenſation in the form of annual rent, to be paid ſo long as the public exigency ſhould require the uſe of this land, would at any rate inſure to the reverſioner his proper quantum of ſatisfaction at the laſt, if the required uſe of the land ſhould continue beyond the duration of the exiſting term; which again evinces the fitneſs of a compenſation meaſured by time, and the unfitneſs of any other rule of compenſation as applied to ſuch a ſubject as the preſent. As the inquiſition therefore appears to us not to be maintainable, the conſideration for the implied promiſe of the defendant of courſe fails, and the plaintiff cannot on that account recover. The verdict therefore muſt in this caſe be entered for the defendant.

Poſtea to the defendant.

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BARING *against* CHRISTIE.

Wednesday, Nov. 28th.

The stat. 13 *C.* 2. *st.* 2. *c.* 2. *s.* 10. giving *double* costs to the defendant in error if judgment be affirmed after verdict, is confined to cases where the judgment so affirmed is for the *plaintiff below*, and not where the defendant below obtains judgment upon a special verdict.

IN an action on a policy of insurance in *C. B.* a special verdict was found, on which there was judgment for the defendant; and on error brought in this Court that judgment was affirmed (*a*), and the single costs only of the writ of error were taxed by the Master for the defendant; on which a rule was obtained on a former day for the Master to review his taxation; the defendant contending that he was entitled to double costs upon the stat. 13 *Car.* 2. st. 2. *c.* 2. *s.* 10. which enacts, "that if any person "shall prosecute any writ of error for reversal of any "judgment whatsoever given after any verdict in any of "the courts aforesaid, and the said judgment shall after-"wards be affirmed, then every such person shall pay "unto the defendant in the said writ of error his *double* "costs, to be assessed by the court where such writ of "error shall be depending, for the delaying of execu-"tion."

Gibbs, *Park*, and *Puller*, shewed cause, and said that it was plain from the preamble to that enactment, which was in the 8th section of the statute that that provision was made solely with a view to prevent *plaintiffs* who had recovered verdicts below from being delayed in their damages by writs of error, and that it did not apply to cases where the defendant below had obtained judgment after verdict, and the writ of error was brought by the plaintiff; because he could not be said in that case to delay execution for any debt. The 8th clause recites and approves the statute 3 *Jac.* 1. *c.* 8. which enacts, "that no

(*a*) Ante, 398.

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execution ſhall be ſtaid or delayed by any writ of error, &c. for the reverſing of any judgment in any action of debt, &c. *or upon any contract*, &c. unleſs the perſon in whoſe name ſuch writ of error ſhall be brought, with two ſufficient ſureties, ſhall before ſuch ſtay made be bound to the party for whom ſuch judgment was given by recognizance *in double the ſum adjudged to be recovered by the ſaid former judgment* to proſecute the ſaid writ of error with effect, and *alſo to ſatisfy and pay*, if the ſaid judgment ſhall be affirmed, all the *debts*, *damages*, and coſts adjudged on the former judgment, and all coſts and damages to be alſo awarded for the ſame delaying of execution," &c. And then reciting "that divers other caſes *within the ſame miſchief* by delays of execution, &c. are not provided for," it makes proviſion for other caſes by *ſ.* 9.: and then by *ſ.* 10. gives the double coſts as a means of guarding againſt ſuch delays by writs of error. And they alſo obſerved that even the ſingle coſts of defendants in caſes like the preſent did not depend upon this ſtatute, but upon the ſubſequent ſtat. of the 8 & 9 *W.* 3. *c.* 11. *ſ.* 2.

The Court expreſſing a ſtrong opinion in favour of this interpretation of the ſtatute, which they ſaid was conſonant to the practice, *Erſkine*, who had obtained the rule niſi did not attempt to ſupport it. And

Lord ELLENBOROUGH C. J. added, that even if there could have been any doubt upon the meaning of the ſtat. of *Car.* 2. which was made to prevent delays of ſuit, and which therefore could not apply to writs of error brought by plaintiffs, who could not be ſaid to *delay* the defendants; yet the ſubſequent ſtatute of King *William*,

liam, which for the firſt time made proviſion even for *ſingle* coſts for defendants, againſt whom writs of error were proſecuted after having obtained judgment below, was a legiſlative interpretation of the former ſtatute, which could not be anſwered.

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Rule diſcharged.

MAXWELL *againſt* SKERRETT.

Wedneſday, Nov. 28th.

A demand of a plea indorſed on the declaration when delivered is good, and a rule to plead may be given afterwards without any freſh demand of a plea.

ON a rule for ſetting aſide the proceedings for irregularity with coſts, the facts were, that the declaration was delivered the 9th of *November*, indorſed to plead in four days, and with a demand of a plea in writing on the back of the declaration: but no rule to plead was given till the 12th of *November*; and on the 17th interlocutory judgment was ſigned as for want of a plea, without any other demand of one.

Marryat in ſupport of the rule contended, that there could be no plea till after a rule to plead given, and that there ſhould afterwards be a demand of a plea 24 hours before interlocutory judgment could be ſigned, for want of which in this caſe the judgment was irregular.

Reader contrà, ſaid, that it had been decided in *The Churchwardens of Edmonton* v. *Oſborne* (a) that a demand of a plea may be made at the time of delivering the declaration. And that it was ſufficient that a rule to plead had in fact been given, though afterwards. And

(a) 6 *Term Rep.* 689.

1804.

MAXWELL *against* SKERRETT.

Per Curiam (after consulting the Master.) The demand of a plea at the time of delivering the declaration has been determined to be good; and though it be usual to give a rule to plead when the declaration is delivered, yet as a rule has been given, though given afterwards, whereby the defendant had more time to plead, there is no objection to it.

Rule discharged.

Tuesday, Nov. 20th.

PIERSON *against* ROBERT VICKERS, ANN his Wife, and Others.

Under a devise of all freehold and copyhold estates whatsoever situate at *B.* with their appurtenances, to *A.* and the heirs of her body lawfully to be begotten whether sons or daughters, as tenants in common; and in default of such issue then over; held, that *A.* took an estate tail.

GENTLE MORRIS, by his will duly executed, dated the 12th of *October* 1789, devised all his freehold and copyhold estates whatsoever, situate at *Belton* in the county of *Lincoln* (which copyhold estate he had surrendered to the use of his will) with all and every their appurtenances unto his daughter *Ann* (the defendant *Ann Vickers*), and to the heirs of her body lawfully to be begotten, whether sons or daughters, as tenants in common and not as joint-tenants; and in default of such issue he devised the said hereditaments and premises to his sisters, (the defendants) *Mary Vickers* and *Jane Preston*, for their joint lives, with remainders to trustees to preserve contingent remainders during the lives of his said sisters. And from and after the decease of either of the said last-named sisters of the testator, he devised the said hereditaments and premises unto all and every the child and children of his said sisters, whether sons or daughters, and their heirs and assigns for ever, as tenants in common, and not as joint-tenants. The testator died soon after; whereupon

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his daughter *Ann Vickers*, or her hufband in her right, entered into and is now in the poffeffion and receipt of the rents and profits of the teftator's freehold and copyhold eftates. The defendants *Mary Ann Vickers*, *Mary Vickers*, *Mary Haldenby*, *John Vickers*, *Jofhua Vickers*, *Elizabeth Vickers*, *Charles Vickers*, and *Gentle Vickers*, are the children of the faid *Ann Vickers*, the teftator's daughter. *Robert Vickers* and *Ann* his wife having been advifed that fhe took an eftate in tail general in the freehold and copyhold premifes in *Belton* by virtue of the faid will, in *Hilary* term 41 *Geo.* 3. fuffered a recovery of the freehold premifes in that parifh; and by leafe and releafe of the 6th and 7th of *February* 1801, the ufes of fuch recovery were declared as to certain parts of the freehold eftate (comprehending the premifes in queftion) to be to fuch perfons, for fuch eftates, under fuch powers, and in fuch manner and form, as *Robert Vickers* fhould by deed or will (to be executed and attefted in the manner ftated in the releafe) appoint; and in default of fuch appointment, to the ufe of the faid *Robert Vickers* in fee. *Robert Vickers* having been alfo advifed that by the means aforefaid he had acquired an eftate in fee fimple, or a power of conveying a fee in the faid freehold premifes in queftion, he fome time after fuffering fuch recovery, contracted in writing to fell the fame to the plaintiff *H. Pierfon*; who objecting to his title, and contending that *Ann Vickers* took only an eftate for life in the faid freehold premifes, by virtue of the faid will, exhibited his bill in the Court of Chancery againft *Robert Vickers* and *Ann* his wife, and the feveral other parties, defendants, for a fpecific performance, if it fhould appear that a good title could be made to the premifes fo contracted for, or if

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not, to have the contract cancelled; and after a hearing before the Master of the Rolls, his Honor directed this case to be stated for the opinion of this Court, upon the question, What estate *Ann Vickers* took or acquired under and by virtue of the said will in the said freehold premises in question?

Holroyd for the plaintiff contended, that *Ann Vickers* took an estate tail. The estate is not devised to her *for life*, and after her decease to the heirs of her body, *whether sons or daughters, as tenants in common;* but it is given to *her and the heirs of her body, &c.*; this indicates that the testator did not mean to confine the devise to his daughter *Ann* to an estate for life, especially when it appears, that where he meant only to give a *life* estate he has so expressed himself, as in the subsequent devise to his two sisters: and there he has interposed trustees to preserve contingent remainders between the devise to his two sisters, and that to their *children*, who he meant should take as purchasers. By "*sons or daughters*" then was meant no more than "male or female." It is true he intended that the heirs of the body of *Ann* should take as *tenants in common*, which they could only do by taking as purchasers; but that would be inconsistent with his principal intent, which was that the estate should not go over to his two sisters and their descendants till failure of all the issue of his daughter *Ann;* for the remainder over is only "in default of such issue," *i. e.* of his daughter. But if the children of *Ann* took as purchasers they could only take for life, there being no words of limitation or other words annexed to the devise to them to carry a greater estate. And again there being no cross

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remainders (*a*) between them, the ſhare of each dying would go over in remainder, which would be contrary to the declared intent of the teſtator, that the eſtate ſhould not go over to his ſiſters till default of iſſue of his daughter. Then if the two intents of the teſtator cannot take effect, namely, that the heirs of the body of *Ann* ſhould take as tenants in common, and alſo that the eſtate ſhould not go over in remainder till total failure of her iſſue, the latter, being the general and principal intent, muſt prevail over the former and minor intent; and that can only be by giving *Ann Vickers* an eſtate tail by reaſon of the deviſe to her and the heirs of her body, and the remainder over being in default of iſſue. As in *Doe* d. *Candler* v. *Smith* (*b*), where the deviſe was to *Mary Aſcough* and the heirs of her body to be begotten, for ever, as tenants in common and not as joint-tenants; and in caſe ſhe ſhall happen to die before 21 or without leaving iſſue on her body, &c. then over: it was holden, that there being a general intent that the eſtate ſhould not go over till failure of all her iſſue, ſhe ſhould take an eſtate tail, although there was a particular intent that her iſſue ſhould take as tenants in common, which by that conſtruction would be defeated. The caſe of *Doe* v. *Cooper* (*c*) is ſtill ſtronger, becauſe in addition to the deviſe to the iſſue of the firſt taker as tenants in common, the limitation to the firſt taker was expreſsly *for life*. And ſo it was in *Robinſon* v. *Robinſon* (*d*). And theſe were recognized by Lord *Alvanley* in the late caſe of *Poole* v. *Poole* (*e*).

(*a*) The limitation over, *in default of iſſue* of his daughter, is of *the ſaid hereditaments and premiſes*: vide therefore *Watſon* v. *Foxon*, 2 *Eaſt*, 36.

(*b*) 7 *Term Rep.* 531.

(*c*) 1 *Eaſt*, 229.

(*d*) 1 *Burr.* 38.

(*e*) 3 *Boſ. & Pul.* 620.

Wood,

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PIERSON *against* VICKERS.

Wood, contrà, contended that the limitation to heirs of the body of *Ann Vickers*, which in itfelf would have given her an eftate tail, was controlled by the fubfequent words "*fons and daughters*," which are words of purchafe, defcriptive of what the teftator meant by *heirs of the body*, and by the limitation to fuch fons and daughters as *tenants in common*; for, as fuch, they can only take by purchafe and not by defcent. Then *Ann Vickers* takes only for life, and her children take as purchafers in fee, by reafon of the word *eftates*, which is fufficient of itfelf to carry a fee to the fons and daughters of *Ann Vickers*: and the intention of the teftator that fhe herfelf fhould only take for life is fhewn by making her children take as purchafers. In all the other cafes the devife was of *lands*, *tenements*, or *hereditaments*, which of themfelves would not carry the fee; fuch was *Doe* d. *Candler* v. *Smith* (*a*), and *Doe* v. *Cooper* (*b*); and in neither of them were the words *heirs of the body* or *iffue* defcribed as here to mean *fons or daughters*. [Lord *Ellenborough*. How do you get rid of the words "*in default of fuch iffue?*"] *Such iffue* has reference to *fons or daughters*, and the teftator meant that if *Ann Vickers* left no fons or daughters living at her death, the eftate fhould then go over, which makes the fubfequent devife an executory devife, being limited after a fee. [*Lawrence* J. What is there in the will to confine the words "in default of fuch iffue" to iffue living at the time of *Ann Vickers*' death?] Becaufe a fee was before given to the children. [*Lawrence* J. Thefe words are always conftrued to mean an indefinite failure of iffue, unlefs reftrained by other words.] It is clear that the teftator meant to prefer the iffue of his daughter to the

(*a*) 7 *Term Rep.* 531. (*b*) 1 *Eaft*, 229.

the issue of his sisters; and having given the latter a fee, it cannot be supposed that he meant to give the former a less estate. 1804.

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Holroyd in reply observed, that if the word *estates* as here used would carry a fee, it would vest the fee in *Ann Vickers*, to whom it applied in the first instance. But it is clear that the testator did not intend that her children should take the whole; for the estate is limited over in default of her issue. Then there are no words of limitation superadded to the devise to her children; which distinguishes this from *Doe* v. *Laming* (*a*); so that unless *Ann Vickers* takes an estate tail, it does not appear that her issue can have a greater estate than for life; and there being no cross remainders the share of each dying would go over, which would be manifestly contrary to the general intent of the testator to prefer his daughter's issue to his sisters'.

Lord ELLENBOROUGH C. J. The two cases cited of *Doe* d. *Candler* v. *Smith*, and *Doe* d. *Cock* v. *Cooper*, seem to apply very strongly to the present. Though it is very doubtful in all these cases whether we do not act contrary to the real intention of the testator in giving more than a life estate to the first taker. However we shall certify our opinion.

LAWRENCE J. In *Doe* d. *Candler* v. *Smith* Lord *Kenyon* felt very forcibly what was the particular intention of the testator, for he says there that "beyond all doubt the testator meant that the first taker should take only an estate for life, because he has said so in express terms:"

(*a*) 2 *Burr.* 1100.

but

1804. Pierson *against* Vickers.

but as that appeared to him to be inconfiftent with his general intent as expreffed in the fubfequent parts of the will, in order to give effect to fuch general intent, he held it neceffary to enlarge the firft taker's eftate to an eftate tail. I doubt in this cafe how the word *eftates* can be conftrued to carry a fee, coupled as it is with words of local defcription, and followed by a devife of the *appurtenances*, which would neceffarily have been included if he had meant to give a fee by the word *eftates*.

Le Blanc J. In almoft every cafe of this fort the rule of law has prevailed againft the particular intent, in giving a larger eftate than for life to the firft taker.

The Court afterwards, on the 28th of *November*, unanimoufly certified in the ufual form to the Mafter of the Rolls, that they were of opinion that *Ann Vickers*, under and by virtue of the will of *Gentle Morris*, took an eftate in tail general in the freehold premifes in queftion.

END OF MICHAELMAS TERM.

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OF THE

PRINCIPAL MATTERS.

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sent afterwards to the prosecutor dropping the prosecution being a mere nullity, and no satisfaction for a prior injury, if any, received by the plaintiff from their act. *Edgecombe* v. *Rodd and Others*, *T.* 44 *G.* 3. 294

ACTION ON THE CASE.

See AGREEMENT, CARRIER, STOCK, No. 1.

1. An action on the case for debauching and getting with child the plaintiff's daughter and servant, per quod servitium amisit, is not maintained by evidence that the daughter, though under age, was living in another person's family in the capacity of a housekeeper, and had no intention at the time of the seduction to return to her father's house, though she afterwards did return there while within age, in consequence of the seduction, and was maintained by her father. *Dean* v. *Peel*, *E.* 44 *G.* 3. 45
2. No such action is maintainable unless laid with a per quod servitium amisit. *Satterthwaite* v. *Duerst*, *E.* 25 *G.* 3. 47 *n.*
3. But though the daughter be of age, yet the action is maintainable if she be living with her father. *Booth* v. *Charlton*, at *Lancaster*, in 1789, cor. *Wilson*, J. 47

ACTION, NOTICE OF.

See JUSTICES OF PEACE.

The stat. 39 *G.* 3. *c.* 69. *s.* 184 directs that the *West India* Dock Company shall sue in the name of their treasurer in all actions by or on behalf of the Company, and that he shall be sued for the recovery of any claim or demand upon, or of any damages occasioned by the Company; and *s.* 185., after extending the protection of the stat. 24 *G.* 2. *c.* 44. for privileging justices of peace in actions brought against them, as such, to the lord mayor and aldermen of *London* acting under this act beyond the limits of the city; directs that "no action shall be commenced against *any person or persons for any thing* done *in pursuance or under colour of this act*, until after 14 days' notice in writing, or after tender of amends," &c.: held that the treasurer of the Company is a *person* within the said clause; and being sued for an act done by the Company which induced an injury to the plaintiffs, was entitled to such notice before the action brought. The notice is necessary in actions for trespasses or torts; but *qu.* Whether in assumpsit? *Wallace* v. *Smith*, *Treasurer of the West India Dock Company*, *E.* 44 *G.* 3. 115

AFFIDAVITS.

Affidavits in support of or in answer to a rule for setting aside an award made a rule of Court under the stat. 9 & 10 *W.* 3. *c.* 15. *s.* 1., there being no action previously brought, nor any cause in court, need not be entitled. *Bainbridge* v. *Houlton*, *E.* 44 *G.* 3. 21

AGENT.

See PRINCIPAL AND AGENT, PRIZE, No. 1.

AGREEMENT.

See PASSAGE MONEY.

1. For the meaning of the word *Agreement*, as it occurs in the statute of frauds, see *Frauds*, *Statute of.*
2. The toleration act, 1 *W.* & *M.* *c.* 18. provides (*s.* 18.) that any person maliciously disturbing any dissenting congregation under that act, on proof before a justice of peace, shall find sureties in 50*l.*, or in default be committed to prison till the next sessions, and on conviction forfeit 20*l.* to the Crown. To

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an action against magistrates for trespass and false imprisonment, they pleaded a charge preferred before them for an offence against that clause, and a commitment for want of sureties under it to the next sessions; and that before the next sessions it was agreed between the prosecutor and the now plaintiff, *with the consent* of the committing magistrates, (the now defendants,) that the prosecution should be dropped, and the plaintiff be discharged at the sessions for want of prosecution; that the plaintiff was accordingly then and there so discharged *in full satisfaction and discharge of the assault and imprisonment*: held this was no legal satisfaction; for either the agreement was illegal, as stifling a prosecution for a *public misdemeanor*, and thereby impeding the course of justice; or the satisfaction, if any, was moving from the prosecutor only, and not from the justices; their authority over the prosecution being at an end after the commitment of the plaintiff, and *their consent* afterwards to the prosecutor dropping the prosecution being a mere nullity, and no satisfaction for a prior injury, if any, received by the plaintiff from their act. *Edgcombe* v. *Rodd and Others*, *T*. 44 G. 3. 294

3. A carrier by water contracting to carry goods for hire *impliedly* promises that the vessel shall be tight and fit for the purpose, and is answerable for damage arising from leakage. And this, though he had given notice "that he would not be answerable for *any* damage *unless* occasioned by want of ordinary care in the master or crew of the vessel, in which case he would pay 10*l*. per cent. upon such damage, so as the whole did not exceed the value of the vessel and freight." For a loss happening by a personal default of the carrier himself (such as the not providing a sufficient vessel) is not within the scope of such notice; which was meant to exempt the carrier from losses by accident or chance, &c. even if it were competent to a common carrier to exempt himself by a special acceptance from the responsibility cast upon him by the common law for a reasonable reward to make good all losses not arising from the act of God, or the king's enemies. *Lyon* v. *Mells*, *T*. 44 G. 3. 428

4. *A*. agreed, in consideration of 10*l*., to let a house to *B*., which *A*. was to repair and execute a lease of *within ten days*, but *B*. was to have immediate possession, and in consideration of the aforesaid was to execute a counterpart, and pay the rent. *B*. took possession, and paid the 10*l*. immediately; but *A*. neglected to execute the lease and make the repairs beyond the period of the ten days, notwithstanding which *B*. still continued in possession: held that *B*. could not, by quitting the house for the default of *A*., rescind the contract and recover back the 10*l*. in an action for money had and received, but could only declare for a breach of the special contract: for a contract cannot be rescinded by one party for the default of the other, unless both can be put in statu quo as before the contract; and here *B*. had an intermediate possession of the premises under the agreement. *Hunt* v. *Silk*, *M*. 45 G. 3. 449

5. Where one delivered goods of *above* 5*l*. value to common carriers to carry *by the mail*, paying no extra price; and by a public notice which had before reached the owner, the carriers had declared they would not be accountable for any package *above* the value of 5*l*., *unless* insured and paid for accordingly: held, that the goods having been sent by a different carriage and lost, the owner

owner could not recover the value against the carriers; for the loss happened by no tortious conversion, nor by a renunciation of their character as common carriers, but only by a negligent discharge of their duty as such. Nor could he recover even the 5*l.*, as by the terms of the notice the carriers stipulated not to be answerable at all for goods *above* 5*l.* value, *unless* paid for accordingly. *Nicholson* v. *Willan*, *M.* 45 *G.* 3. 507

APPRENTICE.

See Stamps, No. 1.

1. The Court will not, at the prayer of the *master*, grant a habeas corpus to bring up an apprentice impressed, he being willing to enter into the king's service. *Ex parte Landsdown*, *E.* 44 *G.* 3. 38

2. The captain of a ship of war detaining an apprentice who had been impressed, after notice by such apprentice, is liable in an action by the master to recover wages for the service of such apprentice. *Eades* v. *Vandeput*, *M.* 25 *G.* 3. 39. n.

ASSETS.

See Executor, No. 1.

ASSUMPSIT,

See Award, No. 1. Bills of Exchange, No. 1. Toll, No. 1.

1. No person can upon the statute of frauds be charged upon any promise to pay the debt of another, unless the *agreement* upon which the action is brought, or some note or memorandum thereof, be in writing; by which word *agreement* must be understood the *consideration* for the promise as well as the promise itself. And therefore where one promised in writing to pay the debt of a third person, without stating on what consideration, it was holden that parol evidence of the consideration was inadmissible by the statute of frauds; and consequently such promise appearing to be without consideration upon the face of the written engagement, it was nudum pactum and gave no cause of action. *Wain* v. *Warlters*, *E.* 44 *G.* 3. 10

2. The plaintiff contracted to carry the defendant, his family, and luggage from *Demerary* to *Flushing*; and in the course of the voyage, within four days sail of *Flushing*, the ship was captured by an *English* ship of war, and brought into *England*, and the ship and cargo libelled for prize in the Court of Admiralty, and the cargo condemned, and proceedings still pending against the ship; but the defendant, and his family were liberated, and their luggage in fact restored to their possession. Held that, however the question might be as to the plaintiff's right to recover passage-money upon an implied assumpsit pro ratâ itineris if the ship were restored, yet pending the proceedings against the ship as prize in the Admiralty Court, no such action could be maintained; for non constat, but that the ship might be condemned and the freight decreed to the captors. *Mulloy* v. *Backer*, *T.* 44 *G.* 3. 316

3. *A.* agreed in consideration of 10*l.* to let a house to *B.*, which *A.* was to repair and execute a lease of *within ten days*, but *B.* was to have *immediate* possession, and in consideration of the aforesaid was to execute a counterpart, and pay the rent. *B.* took possession and paid the 10*l.* *immediately*, but *A.* neglected to execute the lease and make the repairs beyond the period of the ten days, notwithstanding which *B.* still continued in possession: held that *B.* could not, by quitting the house for the default of *A.*, rescind the contract and recover back the 10*l.* in an action for money had and received,

ceived, but could only declare for a breach of the special contract: for a contract cannot be rescinded by one party for the default of the other, unless both can be put in statu quo as before the contract: and here *B.* had an intermediate possession of the premises under the agreement. *Hunt* v. *Silk*, *M.* 45 *G.* 3. 439

ATTACHMENT.

See AWARD, No. 2.

AWARD.

See AFFIDAVIT, No. 1.

1. Where a verdict is taken for a certain sum, subject to the award of an arbitrator, to whom all matters in difference are referred by a rule of nisi prius, he cannot award a *greater* sum than that for which the verdict was taken; and if he do, no assumpsit by implication will arise to pay even to the extent of the verdict so taken. *Bonner* v. *Charlton*, *E.* 44 *G.* 3. 139

2. Where parties by an indorsement in general terms on the bonds of submission to arbitration agree that the time for making the award shall be enlarged, such agreement virtually includes all the terms of the original submission to which it has reference, amongst others, that the submission for such enlarged time shall be made *a rule of Court*: and consequently the party is liable to an attachment for non-performance of an award made within such enlarged time, under the stat. 9 & 10 *W.* 3. *c.* 15. *Evans* v. *Thomson*, *E.* 44 *G.* 3. 189

3. *A.* declared in covenant against *B.* and her husband, for that *B.*, before her intermarriage, covenanted with *A.* by deed to leave certain accounts in difference between them to arbitration, and to *abide* and perform the award, provided it were made during their lives. And *A.* protesting that *B.* had not, before her intermarriage, performed her part of the covenant, averred that *after* making the indenture and *the intermarriage of the defendants*, the arbitrator *awarded B.* to pay *A.* a certain sum; and then alleged a breach for non-payment of such sum. After verdict, on non est factum pleaded; held that upon this declaration it must be taken that *B. intermarried after* the submission and *before* the *award* made; in which case, although the plaintiff could not recover upon the breach assigned *for non-payment of the sum awarded*, because the *marriage* was a *countermand* to the *authority of the arbitrator*; yet as by the marriage itself *B.* had by her own act put it out of her power to perform the award, the covenant to *abide* the award was broken; and therefore judgment could not be arrested on the ground that the marriage was a revocation of the arbitrator's authority, and that so the plaintiff could not recover *as for a breach by non-performance of the award*. *Charnley* v. *Winstanley and his Wife*, *T.* 44 *G.* 3. 266

BANKRUPT.

1. Where the plaintiff gave the defendant in a foreign country, where both were resident, a bill of exchange drawn by the defendant upon a person *in England*, which bill was afterwards protested here for non-acceptance, and the defendant afterwards, while still resident abroad, became bankrupt there, and obtained a certificate of discharge by the law of that state: held that such certificate was a bar to an action here upon an implied assumpsit to pay the amount of the bill in consequence of such non-acceptance in *England*. *Potter* v. *Brown*, *E.* 44 *G.* 3. 124

2. Where *A.* and *B.*, traders living in *London*, were in the course of ordering goods of the defendants cotton manufacturers at *Manchester*, to be sent to *M.* and Co. *at Hull*, for the purpose of being afterwards sent to the correspondents of *A.* and *B. at Hamburgh*; and on the 31st of *March A.* and *B.* sent orders to the defendants for certain goods *to be sent* to *M.* and Co. *at Hull, to be shipped for* Hamburgh *as usual*: held that as between buyer and seller the right of the defendants to stop as *in transitu* was at an end when the goods came to the possession of *M.* and Co. *at Hull*; for they were for this purpose the appointed agents of the vendees, and received orders from them as to the ulterior destination of the goods; and the goods, after their arrival at *Hull, were to receive a new direction from the vendees*. But it was competent for *A.* and *B.*, who became insolvent some time in *July*, but committed no act of bankruptcy till the 26th of *September*, to agree bonâ fide, and not from motives of voluntary and undue preference, to give up the goods to the defendants in the latter end of *July*. And held that the circumstances of the bankrupts' having called a meeting of their creditors, and having taken legal advice, and being encouraged by the result of such meeting and advice to give up the goods, was evidence for the jury to find that the goods were given up bonâ fide, and not from any motive of voluntary and undue preference to the defendants; though done by the bankrupts in a situation of impending bankruptcy at the time; the defendants, at the time of such giving up of the goods by the bankrupts, holding possession of the goods upon a claim of right to stop them in transitu. *Dixon and Others, Assignees of Battier and Son, Bankrupts*, v. *Baldwen and Another*, E. 44 G. 3. 175

3. An order of the Lord Chancellor, made under the stat. 5 *G.* 2. *c.* 30., upon the petition of creditors, for removing one of several Assignees of a bankrupt's estate, not followed up by any re assignment or release of such assignee to the remaining assignees, nor by any new assignment of the commissioners under the Lord Chancellor's further order, does not operate to devest the legal estate out of such removed assignee: and consequently he ought to join in an action of trover brought by the assignees for a ship belonging to the bankrupt's estate. *Bloxam and Others, Assignees of Ward, a Bankrupt*, v. *Hubbard*, *T.* 44 G. 3. 407

4. But if he be not joined, advantage can only be taken by plea in abatement to the whole action; though the other assignees who sue can only recover their proportional parts. *ib.*

5. A sale of a ship (which was afterwards lost at sea) made by the defendant, who claimed under a defective conveyance from a trader before his bankruptcy, is a sufficient conversion to enable the assignees of the bankrupt to maintain trover, without shewing a demand and refusal. *ib.*

6. The ship register acts do not apply to a transfer of property by operation of law, such as from the commissioners to the assignees of a bankrupt. *ib.*

BARON AND FEME.

See POOR-REMOVAL, No. 1.

BILLS OF EXCHANGE.

1. Where the plaintiff gave the defendant, in a foreign country, where both were resident, a bill of exchange drawn by the defendant upon a person *in England*, which bill was afterwards protested here for non-acceptance, and the defendant afterwards, while still resident a-

broad, became bankrupt there, and obtained a certificate of difcharge by the law of that ftate; held that fuch certificate was a bar to an action here upon an implied affumpfit to pay the amount of the bill in confequence of fuch non-acceptance in *England*. *Potter* v. *Brown*, *E.* 44 G. 3. 124

2. A bill of exchange payable to the *order* of *A.*, is payable to *A.* without alleging any order made; and it is fufficient to declare that *A. delivered* the bill to the defendant, which he *accepted*, and by reafon of the premifes and according to the cuftom of merchants became liable to pay the contents to *A.*, without alleging a *re-delivery* of the bill by the defendant: for if a re-delivery, or fomething tantamount, to fhew the affent of the drawee to charge himfelf, be neceffary to an acceptance, the demurrer, by admitting the acceptance, impliedly admits the re-delivery, &c. *Smith* v. *M'Clure*, *M.* 45 G. 3. 476

3. A letter from the drawees of a bill in *England* to the drawer in *America*, ftating that "their profpect of fecurity being fo much improved they *fhall accept* or *certainly pay* the bill," is *an acceptance* in law; although the drawees had before refufed to accept the bill when prefented for acceptance by the holder, who refided in *England*, and again after the writing fuch letter refufed payment of it when prefented for payment; and although fuch letter written before were not received by the drawer in *America* till after the bill became due. *Wynne* v. *Raikes*, *M.* 45 G. 3. 514

CARRIER.

1. A carrier by water contracting to carry goods for hire *impliedly* promifes that the veffel fhall be tight and fit for the purpofe, and is anfwerable for damage arifing from leakage. And this, though he had given notice "that he would not be anfwerable for *any* damage *unlefs* occafioned by want of ordinary care in the mafter or crew of the veffel, in which cafe he would pay 10 per cent. upon fuch damage, fo as the whole did not exceed the value of the veffel and freight." For a lofs happening by the *perfonal* default of the carrier himfelf, (fuch as the not providing a fufficient veffel,) is not within the fcope of fuch notice, which was meant to exempt the carrier from loffes by accident or chance, &c.; even if it were competent to a common carrier to exempt himfelf by a fpecial acceptance from the refponfibility caft upon him by the common law for a reafonable reward to make good all loffes not arifing from the act of God, or the king's enemies. *Lyon* v. *Mells*, *T.* 44 G. 3. 428

2. Where one delivered goods of *above* 5l. *value* to common carriers to carry *by the mail*, paying no extra price; and by a public notice which had before reached the owner the carriers had declared they would not be accountable for any package *above* the value of 5*l.*, *unlefs* infured and paid for accordingly: held, that the goods having been fent by a different carriage and loft, the owner could not recover the value againft the carriers: for the lofs happened by no tortious converfion, nor by a renunciation of their character as common carriers, but only by a negligent difcharge of their duty as fuch. Nor could he recover even the 5*l.* as by the terms of the notice the carriers ftipulated not to be anfwerable at all for goods *above* 5l. *value*, *unlefs* paid for accordingly. *Nicholfon* v. *Willan*, *M.* 45 G. 3. 507

CHARGES.

Where a private act of parliament for building Stonehoufe Bridge directed that

that certain persons and their heirs should stand seised of the tolls of the bridge "to the same uses, trusts, and estates, and subject to the same wills, settlements, limitations, remainders, *charges*, tenures, rents, and incumbrances," as an ancient ferry was, in lieu of which the bridge was erected: held that the word *charges* only extended to *private* charges on the estate. *The case of Stonehouse Bridge, H.* 44 *G.* 3. 356. *n.*

CHARTER.

See Corporation.

COMMITMENT.

See Agreement, No. 2.

COMPENSATION.

Where the stat. 43 *G.* 3. *c.* 55. *s.* 10. enabled a jury to assess a compensation to the owner or persons interested in land, which was taken possession of by Government; which compensation was to be made "for the possession or use thereof during the time for which the same should be required for the public service: held that the assessment of a compensation only *in gross*, and without reference to time, as by an annual rent, was bad; because of the uncertainty of the period for which the land would be required, of which no probable average estimate could be formed pending the exigency. *Bingham* v. *Serle, M.* 45 *G.* 3. 534

CONSTABLES.

See Justices of Peace, or Trespass, No. 1.

CONVICTION.

By the vagrant act 17 *G.* 2. *c.* 5. after "a rogue and vagabond has been committed to the Sessions, and they, adjudging him to be *a rogue and vagabond*, order him to be further imprisoned and kept to hard labour for six months, and to be publicly *whipped* during that time, and that after the expiration of his imprisonment he should be *sent and employed in his Majesty's service pursuant to the statutes*, &c.: held that the whole forms one sentence; and such order being defective in the latter part, for want of adjudicating whether the party were to serve his Majesty by *sea* or *land* as discriminated in the statute, the conviction should be quashed, though the former part of the sentence, adjudging *the rogue and vagabond* to be *whipped*, be valid. *Rex* v. *Patchett, T.* 44 *G.* 3. 339

COPYHOLD.

See the next head.

1. Till the admittance of the surrenderee of a copyhold upon mortgage the surrenderor continues the legal tenant, and he cannot devise the equity of redemption even after the surrender made without a new surrender to the use of his will, but the legal estate, which on his death descends to his heir at law, will carry the equity of redemption also to the heir in respect to the mortgagee. *Doe* d. *Shewen, Widow,* v. *Wroot, E.* 44 *G.* 3. 132
2. Where a copyholder in fee, who had paid a fine on his original admittance, surrendered to the use of himself for life, remainder to his wife for life, remainder over; on which surrender and re-admittance no new fine was paid; and by the custom a remainder-man coming into possession on the death of tenant for life must be admitted and pay a fine: held, that such a custom is good; and that on the death of tenant for life, the next in remainder not coming in to be admitted and pay his fine after proclamations made and presentment by the jury, the

the lord may seize *quousque* the tenant comes in, and maintain ejectment to recover the possession in the mean time. And such proclamations being in general terms for *any* person to come in and make title, &c. and the presentment of default being also general, are good; though the person next in remainder were *known* and *named* in the surrender. *Doe d. Whitbread* v. *Jenney*, *M.* 45 *G.* 3. 522

3. See the next head.

COPYHOLD AND CUSTOMARY ESTATES.

See Copyhold.

1. Where there is a grant of a *particular* thing once sufficiently ascertained by some circumstance belonging to it, the addition of an allegation, mistaken or false, respecting it, will not frustrate the grant; but where a grant is in *general* terms, there the addition of a *particular* circumstance will operate by way of restriction and modification of such grant. Therefore where one having customary tenements, *compounded and uncompounded*, surrendered to the use of his will, "*all and singular the lands*, "*tenements*, *&c. whatsoever in the* "*manor which he held of the lord* "*by copy of court-roll*, in whose tenure or occupation soever the "same were, *being of the yearly* "*rent to the lord in the whole of* "4l. 10s. 8½d., *and compounded* "*for*;" held that the words "*and compounded for*" restrained the operation of the surrender to that description of copyholds then belonging to the surrenderor. And that the words "*being of the yearly rent*, *&c. of* 4l. 10s. 8½d.," which were not referable to any actual amount of the rents, either compounded or uncompounded, though much nearer to the whole than to the *compounded* only, could not qualify or impugn the restriction. *Roe d. Conelly* v. *Vernon*, *E.* 44 *G.* 3. 51

2. Where a testator had *freehold*, *customary*, and *copyhold* estates; and after introductory words, as to *all his worldly estate*, devised two rent-charges out of *all his real* estate, and also two *copyholds* in *Middlesex* for lives, and subject thereto devised "all his *freehold* manors, lands, &c. in *Yorkshire* and other counties, and the reversion of the two copyholds to his son for life, with successive remainders in tail male to his first and other sons, with like remainders to other branches in the male line;" and in default of such issue he devised all his "*said* (freehold) manors, land," &c. to his eldest daughter in tail male in strict settlement, with like remainders to his second and third daughters: and by the residuary clause devised *all other* his manors, lands, &c. either *freehold* or *copyhold*, (except those in the counties of *York*, &c. which he had before disposed of,) subject to the said *rent-charges*, *in failure of issue male of his son* and himself, to his three daughters, as tenants in common in fee: held that certain *customary* estates, which the devisor had, with *freehold* property in *Yorkshire*, did not, on failure of the male line, pass to the eldest daughter under the description of all his *freehold* manors, lands, &c. in that and other counties. For, supposing that the *freehold* of such *customary estates* be in the tenant, and not in the lord, they being holden not *at the will of the lord* as pure copyholds, but *according to the custom of the manor*, and the tenants being entitled to the timber and mines, and the estates being demised and demiseable in fee simple or otherwise; yet as they were holden by copy of court-roll, and passed by surrender and admit-

tance, and were generally reputed and called *copyholds*, and the testator having distinguished in other parts of his will between *copyhold* and *freehold*, he must be presumed to have used the word *freehold* in its usual and popular signification, as not including these *customary estates* considered by himself as *copyholds*; and therefore such customary estates passed to the three daughters under the residuary clause. And it seems that as by such residuary clause the daughters would not take till failure of issue male of the son and of the devisor; he, the son, the heir at law, took an estate-tail by implication in the customary estates not before devised. *Roe d. Conolly* v. *Vernon*, *E.* 44 *G.* 3. 51

CORPORATION.

See Toll, No. 1.

1. A charter granted to the mayor, bailiffs, and burgesses, or the greater part of them, to choose *one of themselves* to be mayor; but the same charter appointed the first mayor to continue for a year and until some *other burgess* should be elected and sworn, and the two first bailiffs to continue until *two other burgesses* should be elected and sworn; and it also directed the new mayor to be sworn in before the *last* mayor, *his predecessor*, and the bailiffs for the time being, and the burgesses present; and in like manner the new bailiffs to be sworn in before the mayor and the *last* bailiffs and the burgesses present. These latter provisions explain the first, and shew that the mayor must be chosen *out of the burgesses at large*, and not out of *the bailiffs*; and this avoids any question as to the validity of a *swearing in* of an officer *before himself* by his name of office. *Rex* v. *Harper*, *F.* 44 *G.* 3. 208

2. Where a corporation, by a verbal agreement with a pauper, leased to him the tolls of a market for above 10*l.* a-year; held that he could not gain a settlement thereby, as no interest could pass from a corporation but under their seal; therefore he had no more than a mere licence to collect the toll. But if such toll had been leased to him under seal of the corporation, semble that he would have gained a settlement by residing for 40 days in the same parish where the market was. *Rex* v. *The Inhabitants of Chippingnorton*, *T.* 44 *G.* 3. 239

3. The voluntary absence of a chief officer of a corporation upon the charter-day of election of his successor is not indictable upon the stat. 11 *G.* 1. *c.* 4. *s.* 6., unless his presence as such chief officer be *necessary* by the constitution of the corporation to constitute a legal corporate assembly for such purpose. *Rex* v. *Corry*, *T.* 44 *G.* 3. 372

4. Where a corporation were seised in fee of lands, which by the custom were annually meted out under their controul by a leet jury, according to a certain stint, to such of the resident burgesses who chose to stock the same; they paying 19*s.* 4*d.* to each of the other burgesses who did not stock: held that the burgesses who so stocked were tenants in common of the lands so occupied by them, and as such occupiers were liable to be rated for the same. *Rex* v. *Watson*, *M.* 45 *G.* 3. 480

COSTS.

1. Where the plaintiff recovered a verdict at the trial and had judgment in *C. B.*, and upon a bill of exceptions returned into this court judgment was reversed, and the plaintiff took nothing by his writ, the defendant cannot have costs. *Bell* v. *Potts*, *E.* 44 *G.* 3. 49

2. The

2. The *London* Court of Requests has jurisdiction by the stat. 39&40 *G.* 3. *c.* 104. over a contract for the retention of tithes by the tenant, the value of which was under 5*l.* And therefore if the vicar sue in the superior courts for the same, and recover less than 5*l.* upon a count in assumpsit for a quantum valebant, the defendant may enter a suggestion on the roll, stating that he was a freeman and inhabitant of the city of *London*, trading there at the time he was served with the writ, for the purpose of ousting the plaintiff of his costs, under the 12th sect. of the act. *Sandby, Clk.* v. *Miller, E.* 44 *G.* 3. 194

3. Where in assumpsit the defendant pleaded the general issue, and the statute of limitations to the whole sum demanded, and as to part of it that the promises were made by the defendant's testator and one *A. B. jointly*, which *A. B.* survived the other, and is still living; and this last issue was found at the trial for the defendant, and the other two issues for the plaintiff, who thereupon had judgment for the rest of his damages and costs: held that the defendant was not entitled to have the costs of the issue found for her deducted from the costs of the trial which the plaintiff was entitled to on the issues found for him: aliter where all *the issues at the trial* are found for the defendant, but the plaintiff has judgment upon demurrer, and recovers damages on a writ of inquiry. *Postan* v. *Stanway, Executrix, T.* 44 *G.* 3. 261

4. An application to make the plaintiff, who resided abroad, give security for the costs, refused after notice of trial given; as the defendant might have applied earlier after knowledge of the fact of the plaintiff's residence, and before so much of the costs were incurred. *Walters* v. *Frythall, T.* 44 *G.* 3. 338

5. Where a verdict was taken for 10*l.* in trespass, subject to an award of damages, and the costs *to abide the event*; if the arbitrator find less than 40*l.* damages, the plaintiff cannot have his costs, though it be also found that the trespass was *wilful*, and *that the defendant should pay the plaintiff his costs*: for costs being directed to abide *the event*, means the *legal* event; and the authority of a judge to certify for costs under the stat. 22 & 23 Car. 2. *c.* 9., where the trespass is wilful is not transferred to the arbitrator under such a rule of reference. *Ward* v. *Mallinder, M.* 45 *G.* 3. 180

6. The stat. 13 C. 2. st. 2. *c.* 2. *s.* 10. giving *double* costs to the *defendant* in error, if judgment be affirmed after verdict, is confined to cases where the judgment so affirmed is for *the plaintiff below* and not where *the defendant below* obtained judgment upon a special verdict. *Baring* v. *Christie*, 45 *G.* 3. 545

COURT OF REQUESTS, LONDON.

See London Court of Requests.

COVENANT.

1. One who covenants for *himself, his heirs*, &c. and under his *own hand and seal*, for the act of another, shall be personally bound by his covenant, though he describe himself in the deed as covenanting *for and on the part and behalf of such other person*. *Appleton* v. *Binks, E.* 44 *G.* 3. 148

2. *A.* declared in covenant against *B.* and her husband, for that *B.* before her intermarriage covenanted with *A.* by deed to leave certain accounts in difference between them to arbitration, and to *abide* and perform the award, provided it were mode during their lives. And *A.*, pro-

protesting that *B.* had not before her intermarriage performed her part of the covenant, averred that *after* making the indenture and *the intermarriage of the defendants*, the arbitrator *awarded* B. to pay *A.* a certain sum; and then alleged a breach for non-payment of such sum. After verdict, on non est factum pleaded; held that upon this declaration it must be taken that *B. intermarried after* the submission and *before* the *award* made; in which case, although the plaintiff could not recover upon the breach assigned, *for non-payment of the sum awarded*, because the *marriage* was a *countermand* of the *authority of the arbitrator*; yet as by the marriage itself *B.* had by her own act put it out of her power to perform the award, the covenant to *abide* the award was broken; and therefore judgment could not be arrested on the ground that the marriage was a revocation of the arbitrator's authority, and that so the plaintiff could not recover *as for a breach by non performance of the award. Charnley* v. *Winstanley and Wife. T.* 44 *G.* 3. 266

CUSTODY.

B. being in custody at the suit of *A.*, in a joint action against *B.* and *C.* *B.* justifies bail in an action intitled by mistake " *A.* against *B.*" only, and a rule so intitled is served on the marshal of *B. R.*, who thereupon discharges *B.* out of custody, he not being charged in custody in any more than one action at the suit of *A.*: held that the marshal was liable in an action for an escape. *White* v. *Jones, Marshal of K. B. &c. T.* 44 *G.* 3. 292

CUSTOMARY ESTATES.

See COPYHOLD AND CUSTOMARY ESTATES.

DAMAGES.

See COMPENSATION.

DEBAUCHING DAUGHTER.

See ACTION ON THE CASE, No. 1.

DEVISE.

See WILL.

1. Where a testator had *freehold, customary*, and *copyhold* estates; and after introductory words, as to *all his worldly estate*, devised two rent-charges out of *all his real* estate, and also *two copyholds* in *Middlesex* for lives; and subject thereto devised " all his *freehold* manors, lands, &c. in *Yorkshire* and other counties, and the reversion of the two copyholds to his son for life, with successive remainders in tail male to his first and other sons, with like remainders to other branches in the male line:" and in default of such issue he devised all his "*said* (freehold) manors, land," &c. to his eldest daughter in tail male in strict settlement, with like remainders to his second and third daughters: and by the residuary clause devised *all other* his manors, lands, &c. either *freehold* or *copyhold* (except those in the county of *York*, &c. which he had before disposed of), subject to the said *rent-charges*, *in failure of issue male of his son* and himself, to his three daughters as tenants in common, in fee: held that certain *customary* estates, which the devisor had, with freehold property in *Yorkshire*, did not, on failure of the male line, pass to the eldest daughter under the description of all his *freehold* manors, lands, &c. in that and other counties. For supposing that the *freehold* of such *customary estates* be in the tenant, and not in the lord, they being holden not *at the will of the lord* as pure copyholds, but *according to the custom of the manor*, and the

the tenants being entitled to the timber and mines, and the estates being demised and demiseable in fee simple or otherwise; yet as they were holden by copy of court-roll, and passed by surrender and admittance, and were generally reputed and called *copyholds*, and the testator having distinguished in other parts of his will between *copyhold* and *freehold*, he must be presumed to have used the word *freehold* in its usual and popular signification, as not including these *customary* estates, considered by himself as *copyholds*; and therefore such customary estates passed to the three daughters under the residuary clause. And it seems that as by such residuary clause the daughters would not take till failure of issue male of the son and of the devisor; he, the son, the heir at law, took an estate tail by implication in the customary estates not before devised. *Roe d. Conolly* v. *Vernon*, E. 44 G. 3. 51

2. One devised thus: "Concerning "my wordly estate, I give and be- "queath to *M. M.* 1*s*. *Also I give* "*and bequeath* to *A. M.* 2*s*." (with pecuniary bequests to several others in the same form of words); "*Also* "*I give and bequeath* to *G. S.* my "messuage and lands, &c. in *W.* "*Also I give and bequeath* to the "said *G. S.* and his wife all my "lands, &c. in *B.* *Also* all my mes- "suages, &c. in *W.* *Also* all my "goods, chattels, &c. and personal "estate, *after having thereout first* "*paid and discharged* all my *debts* "*and funeral expences*: *Also subject* "*to the payment thereout all the afore-* "*said legacies*. And I nominate the "said *G. S.* to be *sole executor*, "*whom I charge* with the payment "of my debts, legacies, and funeral "expences," &c. Held that G. S. and his wife took a fee in the real estate devised to them, by reason of the words "*having thereout first* "*paid all my debts*," &c. which was a *personal* charge on them in respect of the realty as well as personalty, all devised in one entire sentence, together with such charge. *Doe d. Stevens and Pain* v. *Snelling*, E. 44 G. 3. 87

3. Under a devise of *lands*, *arrears of rent*, and *a bond and judgment*, to trustees and the *survivor*, and the *executors*, &*c.* of such survivor, in trust, *out of the rents and profits* of the said estates and arrears, &c. to pay certain *annuities* for *lives*, and *a sum in gross*; and from and after payment of the said annuities and money, the testator devised four or five estates for lives, remainder to *C. W.* in tail, remainder to his own right heirs; and he also gave a general power of *leasing* to the trustees for the best rent, with an allowance of 10*l.* a year to each for their trouble: held that *the purposes of the trust being all answered* by the death of the annuitants, and the raising of the money for legacies, the remainder-man in tail, (the life estate being spent,) took the *legal* estate in the premises. For where the purposes of a trust may be answered by giving the trustees a less estate than a fee, no greater estate shall pass to them *by implication*; but the uses in remainder limited on such lesser estate so given to them shall be executed by the statute. And in this case it is sufficient to answer the purposes of the trust to give the trustees by implication an estate *for the lives of the annuitants*; with *a term of years in remainder* sufficient for the purpose of raising the *gross sum* charged *out of the rents and profits*. And this construction is further confirmed in this particular case by the bequest to the trustees of the *arrears* and *the bond and judgment*, as well as of the rents and profits; for other-

otherwise the interest in the bond, &c. would go to different representatives than the estate, if the trustees took a *fee*; and the *leasing power* was only to be executed as the occasions of the trust required. And there was also a *personal remuneration* to the trustees of 10*l.* a year for their trouble, which was not extended to their *heirs*. *Doe d. White* v. *Simpson*, *E.* 44 *G.* 3. 162

4. Under a devise "to *A.* for life, "and after him to his eldest or any "other son after him for life, and "after them to as many of his de-"scendants issue male as shall be "heirs of his or their bodies down "to the tenth generation, during "their natural lives:" held that *A.* took no more than a life estate; for here is no *general* intent to create an estate tail, as contradistinguished from the *particular* intent to give an estate for life to the first taker; but a single intent to create a succession of life estates to persons not in esse, which the law will not allow. *Seaward* v. *Willock*, *E.* 44 *G.* 3. 198

5. The word *share* may carry a leasehold estate. As where a testator, having three sons and one daughter, and leasehold estates and personal funds, devised one leasehold estate to his eldest son, and other leaseholds to his second son, directing his executors to receive and apply the rents until they came of age; and then directed a certain sum to be put out at interest for the benefit of his widow, durante viduitate, and that on her death or marriage it should be divided equally between his three sons, *share and share alike*; and then he gave his daughter 600*l.* to be paid her when of age; and then gave the residue of his worldly effects to be divided equally amongst his three sons, *share and share alike*; and lastly directed that "if any of his said children died under age and without lawful issue, the *share* of *him* or *her* deceased should go equally amongst his surviving sons:" held, that the word *share* in the last clause referring as it must do to the *whole* share or portion of the *daughter*, must have the same meaning as to the sons, and must comprise the leasehold as well as personal funds before given to them; and that upon the death of the eldest son under 21, and without issue, the leasehold estate devised to him went equally between the two surviving sons. *Doe d. Stopford* v. *Stopford*, *M.* 45 *G.* 3. 501.

6. Under a devise of all freehold and copyhold estates whatsoever situate at *B.* with their appurtenances, to *A.* and the *heirs of her body* lawfully to be begotten whether *sons or daughters*, as *tenants in common*; and in default of such issue, then over: held that *A.* took an estate tail. *Pierson* v. *Vickers*, *M.* 45 *G.* 3. 548

DISCHARGE OF DEBTOR.

See ESCAPE.

EAST INDIA COMPANY.

See INDICTMENT against Officers in *India* for receiving Presents contrary to the stat. 33 *G.* 3. *c.* 52. *s.* 62.

EJECTMENT.

See COPYHOLD, No. 2. JOINT TENANTS, No. 1. NOTICE TO QUIT.

In Ejectment the legal title must prevail, vid. *Weakley* d. *Yea Bart.* v. *Rogers*, in the Exchequer Chamber, *M.* 30 *G.* 3. and other cases refered to in the note to *Doe* d. *Shewen* v. *Wroot*. 138-9

EQUITY OF REDEMPTION.

See COPYHOLD, No. 1.

ERROR,

ERROR, WRIT OF.

See PRACTICE, No. 2.

ESCAPE.

1. *B.* being in custody at the suit of *A.* in a joint action against *B.* and *C.* *B.* justifies bail in an action entitled by mistake "*A.* against *B.*" only, and a rule so entitled is served on the marshal of *B. R.* who thereupon discharges *B.* out of custody, he not being charged in custody in any more than one action at the suit of *A.*: held that the marshal was liable in an action for an escape. *White* v. *Jones, Marshall of K. B.* &c., *T.* 44 G. 3. 292
2. In an action against the marshal for an escape, it being alleged in the declaration that the prisoner was arrested on mesne process, and brought before a judge at chambers by virtue of a writ of habeas corpus, and was by him thereupon *committed* to the custody of the marshal, *as by the record thereof now remaining in the Court of B. R.* appears, &c. such allegation is either impertinent and surplusage; for properly speaking, such document are not *records* nor capable of becoming so: or, considering them as *quasi of record*, the allegation is sufficiently proved by the production of them from the office of the clerk of the papers of the *K. B.* prison, with whom they were properly deposited. *Wigley* v. *Jones, Marshal of the Marshalsea*, *T.* 44 G. 3. 440

EVIDENCE.

1. No person can by the statute of frauds be charged upon any promise to pay the debt of another, unless the *agreement* upon which the action is brought, or some note or memorandum thereof, be in writing; by which word *agreement* must be understood the *consideration* for the promise as well as the *promise* itself. And therefore where one promised in writing to pay the debt of a third person, without stating on what consideration; it was holden that *parol* evidence of the consideration was inadmissible by the statute of frauds; and consequently such promise appearing to be without consideration upon the face of the written engagement, it was nudum pactum and gave no cause of action. *Wain* v. *Warlters*, *E.* 44 G. 3. 10
2. An averment that the plaintiff was ready and willing to transfer and requested the defendant to accept stock, can only be satisfied by shewing an actual tender and refusal, or that the plaintiff waited at the bank on the day when it was understood that the transfer was to be made until the close of the transfer-books, which was the latest time when the transfer could be made. *Bordenave* v. *Gregory*, *E.* 44 G. 3. 107
3. An averment that stock was to be transferred *on request* is not proved by evidence that it was to be transferred on *a certain day*. *Bordenave* v. *Bartlett*, *E.* 44 G. 3. 111
4. The Sessions having decided in favour of a settlement in *A.*, by which the pauper's father was proved to have been *relieved while resident in another parish* 40 years ago, and before the pauper's birth; and the only evidence to oppose this being that of the pauper's own birth in *B.*; this Court confirmed the order of Session on a case reserved. *Rex* v. *The Inhabitants of Wakefield*, *T.* 44 G. 3. 335

EXECUTION.

If one of two defendants taken on a joint ca. sa. be discharged under an insolvent debtors act, that will not operate as a discharge of the other, the discharge

charge of the former not being with the actual consent of the plaintiff. *Nadin* v. *Battie and Wardle*, E. 44 G. 3. 147

EXECUTOR.

A count upon an account stated with the plaintiff, *executrix*, &c. (not saying *as* executrix, &c.) cannot be joined with counts on promises to the testator; for it is no allegation that the promises were made to the plaintiff in her representative capacity; and under such a count proof might be given of an account stated with her in her individual character. *Qu.* Whether if it had been laid to be on an account stated with the plaintiff herself, though named *as executrix*, &c. it could be so joined, as the cause of action would still appear to have arisen in the time of the executrix, though the money, when recovered, would be assets? *Henshall* v. *Roberts, in error*, E. 44 G. 3. 150

EXEMPTION.

Where an act directs that the *tolls* of a navigation should be exempt from any taxes, rates, &c. other than such as the *land* which should be used for the purpose of the navigation would have been subject to if the act had not been made; that goes to exempt the *tolls* quà *tolls* altogether from being rated in respect of the line so exempted, leaving the *land* rateable as before. *Rex* v. *The Leeds and Liverpool Canal Company*. T. 44. G. 3. 325

FALSE IMPRISONMENT.

1. The toleration act, 1 *W. & M.* c. 18. provides (*s.* 18.) that any person maliciously disturbing any dissenting congregation under that act, on proof before a justice of peace, shall find sureties in 50*l.*, or in default be committed to prison till the next sessions, and on conviction forfeit 20*l.* to the Crown. To an action against magistrates for trespass and false imprisonment, they pleaded a charge preferred before them for an offence against that clause, and a commitment for want of sureties under it to the next sessions; and that before the next sessions it was agreed between the prosecutor and the now plaintiff, *with the consent* of the committing magistrates (the now defendants), that the prosecution should be dropped, and the plaintiff be discharged at the sessions for want of prosecution; that the plaintiff was accordingly then and there so discharged *in full satisfaction and discharge of the assault and imprisonment*: held this was no legal satisfaction; for either the agreement was illegal, as stifling a prosecution for a *public misdemeanor*, and thereby impeding the course of justice; or the satisfaction, if any, was moving from the prosecutor only, and not from the justices; their authority over the prosecution being at an end after the commitment of the plaintiff; and *their consent* afterwards to the prosecutor dropping the prosecution being a mere nullity, and no satisfaction for a prior injury, if any, received by the plaintiff from their act. *Edgcombe* v. *Rodd and Others*, T. 44 G. 3. 294

2. An indictment for an assault, false imprisonment, and rescue, stated that the Judges of *the Court of record of the town and county*, &c. of *P.*, issued their writ, directed to *T. B.*, *one of the Serjeants at Mace of the said town and county*, to arrest *W.*, by virtue of which *T. B.* was proceeding to arrest *W. within the jurisdiction of the said Court*, but that the defendant assaulted *T. B. in the due execution of his office*, and prevented

vented the arrest: held such indictment bad; it not appearing that *T. B.* was *an officer of the Court*: and that there could not be judgment after a *general* verdict on such a count as for a common assault and false imprisonment, because the jury must be taken to have found that the assault and imprisonment was for the cause therein stated, which cause appears to have been that the officer was attempting to make an illegal arrest of another, which being a breach of the peace, the defendant might, for aught appeared, have lawfully interfered to prevent it. *Rex* v. *Osmer*, *T.* 44 *G.* 3. 504

FOREIGN SENTENCES.

1. Where a foreign Court of Prize professes to condemn a ship and cargo on the ground of *an infraction of treaty* in not being properly documented, &c. as required by the treaty between the captors and captured; such sentence is conclusive in our courts against *a warranty of neutrality* of such ship and cargo in an action upon a policy of insurance against the underwriter; although inferences were drawn in such sentence from ex parte ordinances in aid of the conclusion of such infraction of treaty. *Baring* v. *The Royal Exchange Assurance Company*, *E.* 44 *G.* 3. 99

2. A sentence of a foreign Court of Prize is conclusive evidence in an action upon a policy of insurance upon every matter within the jurisdiction of such Court upon which it has professed to decide. Therefore where a *Danish* ship, *warranted neutral*, was captured by a *French* ship of war, (*Denmark* being at peace with *France*,) and the court in which she was libelled as prize, professing to consider that the *built* of the vessel was *unknown*, that she was *sold to a neutral* subject *only since* the declaration of war, that the bill of sale did not mention her *place of built*, or her *original owner*, that the mate and third officer were naturalized *Danes only since* the declaration of war, and that the greater part of the *crew* were subjects of *hostile* powers, condemned the ship as *good and lawful prize*; such condemnation is conclusive against the warranty of neutrality in an action on the policy against the underwriter; and no evidence can be received to falsify the facts affirmed by such sentence, nor to shew that the conclusion was unfounded: although the sentence proceeded to refer to certain ordinances of *France*, containing rules to direct the judgment of its Courts in the consideration of the question of neutrality; by which rules the Prize Court appears to have regulated their judgment in the conclusion they had drawn. *Bolton* v. *Gladstone*, *E.* 44 *G.* 3. 155

FORFEITURE.

See AGREEMENT, No. 2.

FRAUDS, STATUTE OF.

1. No person can, by the statute of frauds, be charged upon any promise to pay the debt of another, unless the agreement upon which the action is brought, or some note or memorandum thereof, be in writing; by which word *agreement* must be understood the *consideration* for the promise, as well as the *promise* itself. And therefore where one promised in writing to pay the debt of a third person, without stating on what consideration; it was holden that *parol* evidence of the consideration was inadmissible by the statute of frauds; and consequently such promise appearing to be without consideration upon the face of the written engagement, it was nudum pactum, and

and gave no cause of action. *Wain v. Warlters, E.* 44 *G.* 3. 10
2. The statute is supposed to have been drawn by Lord *Hale.* *ib.* 17

FREEHOLDER.

See Pressing, No. 2.

FREIGHT.

See Insurance, No. 3. Passage-money.

GRANT.

1. Where there is a grant of a particular thing once sufficiently ascertained by some circumstance belonging to it, the addition of an allegation, mistaken or false, respecting it, will not frustrate the grant: but where a grant is in *general* terms, there the addition of a *particular* circumstance will operate by way of restriction and modification of such grant. *Roe d. Conolly v. Vernon, E.* 44 *G.* 3. 51
2. Therefore where one having customary tenements, *compounded and uncompounded*, surrendered to the use of his will "*all and singular the lands,* "*tenements, &c. whatsoever, in the* "*manor, which he held of the lord by* "*copy of court-roll,* in whose tenure or "occupation soever the same were, "*being of the yearly rent to the lord* "*in the whole of* 4l. 10s. 8½d., *and* "*compounded for:*" held that the words "*and compounded for,*" restrained the operation of the surrender to that description of copyholds then belonging to the surrenderor. And that the words "*being of the* "*yearly rent, &c. of* 4l. 10s. 8½d.," which were not referable to any actual amount of his rents, either compounded or uncompounded, though much nearer to the whole than to the compounded only, could not qualify or impugn that restriction. *ib.*

HABEAS CORPUS.

See Apprentice, No. 1. Record.

1. The father of a child is entitled to the custody of it, though an infant at the breast of its mother, if the Court see no ground to impute any motive to the father injurious to the health or liberty of such a child, as by sending it out of the kingdom; the father being at the time an alien enemy domiciled in this kingdom, and the mother being an *Englishwoman,* and apprehensive only that he meant to send the child abroad, but assigning no sufficient reason for such her apprehension. *Rex* v. *de Manneville, E.* 44 *G.* 3. 221
2. If the putative father of a bastard child obtain possession of it by force or fraud, the Court will order it to be restored on the application of the mother. *Rex* v. *Moseley, H.* 38 *G.* 3. 224

HUSBAND AND WIFE.

See Poor-Removal, No. 1.

INDICTMENT.

1. Every indictment must contain a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy. But, except in certain cases, where technical expressions, having grown by long use into law, are required to be used, the same sense is to be put on the words of an indictment which they bear in ordinary acceptation: and if the sense of any word be in ordinary acceptation ambiguous, it shall be construed according as the context and subject-matter require it to be in order to make the whole consistent and sensible. The word *until* may therefore be construed either exclusive or inclusive of the day to which it is applied, according to the context and subject-matter

matter. *Rex* v. *Stevens and Agnew*, *T.* 44 *G.* 3. 244

2. Therefore, where an information on the stat. 33 *G.* 3. *c.* 52. *s.* 62. prohibiting *officers* of the *East-India* Company, *residing in* India, from receiving presents, charged that the defendants being *British subjects*, on the 1st *January* 1794, and from thence for a long time, to wit, *until* the 29th *November* 1795, held certain offices under the Company, and *during all that time resided in the* East Indies; and that *whilst* they held the said offices *as aforesaid*, and *whilst they resided in the* East Indies *as aforesaid*, to wit, *on the* 29*th of* November 1795, they received certain presents: held that the context shewed that the word *until* was to be taken *inclusive* of the 29th *November* 1795. *ib.*

3. But that if it had been incapable of receiving an *inclusive* construction, the words under the first videlicet, "*until the* 29*th of November* 1795," could not have been rejected as surplusage; for that can never be where the allegation is sensible and consistent in the place where it occurs, and not repugnant to *antecedent* matter, though laid under a *videlicet*, and however inconsistent with an allegation *subsequent*. *ib.*

4. An indictment for an assault, false imprisonment, and rescue, stated that the Judges of the *Court of Record of the town and county*, &c. of *P.* issued their writ, directed to *T. B.* *one of the serjeants at mace of the said town and county*, to arrest *W.*, by virtue of which *T. B.* was proceeding to arrest *W.* *within the jurisdiction of the said Court*, but that the defendant assaulted *T. B.* *in the execution of his office*, and prevented his arrest: held such indictment bad; it not appearing that *T. B.* was *an officer of the Court*: and that there could not be judgment after a *general* verdict on such a count as for a common assault and false imprisonment, because the jury must be taken to have found that the assault and imprisonment was for the cause therein stated; which cause appears to have been that the officer was attempting to make an illegal arrest of another, which, being a breach of the peace, the defendant might, for aught appeared, have lawfully interfered to prevent it. *Rex* v. *Osmer*, *T.* 44 *G.* 3. 304

5. The voluntary absence of a chief officer of a corporation upon the charter-day of election of his successor is not indictable upon the stat. 11 *G.* 1. *c.* 4. *s.* 6., unless his presence as such chief officer be *necessary* by the constitution of the corporation to constitute a legal corporate assembly for such purpose. *Rex* v. *Corry*, *T.* 44 *G.* 3. 372

INFERIOR JURISDICTION.

See London Court of Requests.

INSOLVENT DEBTORS' DISCHARGE.

See Execution, No. 1.

INSURANCE.

1. Where a foreign Court of Prize professes to condemn a ship and cargo on the ground of *an infraction of treaty* in not being properly documented, &c. as required by the treaty between the captors and captured; such sentence is conclusive in our courts against *a warranty of neutrality* of such ship and cargo in an action upon a policy of insurance against the underwriter; although inferences were drawn in such sentence from ex parte ordinances in aid of the conclusion of such infraction of treaty. *Baring* v. *The Royal Exchange Assurance Company*, *E.* 44 *G.* 3. 99

2. A sentence of a foreign Court of Prize is conclusive evidence in an

an action upon a policy of insurance upon every matter within the jurisdiction of such Court upon which it has professed to decide. Therefore where a *Danish* ship, *warranted neutral*, was captured by a *French* ship of war, (*Denmark* being at peace with *France*,) and the court in which she was libelled as prize, professing to consider that the *built* of the vessel was *unknown*, that she was *sold* to a *neutral* subject *only since* the declaration of war, that the bill of sale does not mention her *place of built*, or her *original owner*, that the mate and third officer were naturalized *Danes only since* the declaration of war, and that the greater part of the *crew* were subjects of *hostile* powers, condemned the ship as *good and lawful prize*; such condemnation is conclusive against the *warranty of neutrality* in an action on the policy against the underwriter. And no evidence can be received to falsify the facts affirmed by such sentence, nor to shew that the conclusion was unfounded: although the sentence proceeded to refer to certain ordinances of *France*, containing rules to direct the judgment of its Courts in the consideration of the question of neutrality; by which rules the Prize Court appeared to have regulated their judgment in the conclusion they had drawn. *Bolton* v. *Gladstone*, *E.* 44 *G.* 3. 155

3. Upon a hostile embargo in a foreign port, the owner, who had separately insured *ship* and *freight*, abandoned them to the respective underwriters, which was accepted by them; after which the embargo was taken off, and the ship completed her voyage and earned freight: held that the assured could not recover as for a total loss of freight, the freight having been in fact earned; or, supposing it to have been in any other sense lost to the assured by the abandonment of the ship to the underwriters thereon, it was so lost, not by any peril insured against, but by the voluntary act of the assured in making such abandonment. *M'Carthy* v. *Abel*, *T.* 44 *G.* 3. 388

4. The 25th article of the treaty of *February* 1778, between *France* and *America*, which requires the vessels of the allies, in case either is at war, to be furnished with a passport expressing (inter alia) *the place of habitation* of the commander of the vessel, is not complied with by a passport granting leave "to *G. D.* commander of the ship called *M. V.* *of the town of* P., of the burden of," &c; such description of place being applicable only to the *ship* as the last antecedent, which is further described by her burthen in a continuing sentence; and therefore the plaintiff was holden not entitled to recover upon a policy of insurance on such ship warranted *American*, which had been captured by the *French*, and condemned as prize. *Baring* v. *Christie*, *T.* 44 *G.* 3. 398

INTEREST.

See PRIZE, No. 1.

JOINDER IN ACTION.

1. A count upon an account stated with the plaintiff, *executrix*, &c. (not saying *as executrix*, &c.) cannot be joined with counts on promises to the testator; for it is no allegation that the promises were made to the plaintiff in her representative capacity: and under such a count proof might be given of an account stated with her in her individual character. *Qu.* Whether, if it had been laid to be on an account stated with the plaintiff herself, though named *as executrix*, &c. it could be so joined; as the cause of action would still appear to have arisen in the time of the executrix, though the money, when recovered, would be assets. *Henshall*

Henshall v. *Roberts*, in error. *E.* 44 *G.* 3. 150

A., B., and C., having dissolved partnership, C. after such dissolution drew bills in the partnership firm in favour of D., he not knowing of such dissolution; upon which D. brought his action against all the former partners; and C. having pleaded his bankruptcy, D. entered a noli prosequi as to him, and recovered judgment against A. and B., which was afterwards satisfied by the attorney of A. and B., who advanced part, and borrowed the rest of the money on their *joint* credit: held that the sum so paid in satisfaction of the judgment might be recovered in a *joint* action by A. and B. against C. *Osborne and Amphlett* v. *Harper*, *T.* 44 *G.* 3. 225

3. An order of the Lord Chancellor, made under the stat. 5 *Geo.* 2. *c.* 30, upon the petition of creditors for removing one of the several assignees of a bankrupt's estate, not followed up by any re-assignment or release of such assignee to the remaining assignees, nor by any new assignment of the commissioners under the Lord Chancellor's further order, does not operate to divest the legal estate out of such removed assignee: and consequently he ought to join in an action of trover brought by the other assignees for a ship belonging to the bankrupt's estate: but if he be not joined, advantage can only be taken by a plea in abatement to the whole action: though the other assignees who sue can only recover their proportional parts. *Bloxam, Knt. and Others, Assignees of Ward, a Bankrupt*, v. *Hubbard*, *T.* 44 *G.* 3. 407

JOINT-TENANT.

Where a lease for 21 years contained a proviso, that in case either landlord or tenant, or their respective heirs or executors, wished to determine it at the end of the first 14 years, and should give six months' notice in writing *under his or their respective hands*, the same should cease; held that a notice to quit, signed by *two only* of *three* executors of the original lessor, to whom he had bequeathed the freehold *as joint tenants*, expressing the notice to be given *on behalf of themselves and the third executor*, was not good under the proviso, which required it to be given under the hands of all three. Neither could such notice be sustained under the general rule of law, that one joint tenant may bind his companions by an act done for *his benefit*; for non constat that the determination of the lease was for the benefit of the co-joint-tenant; which it was incumbent on the party who wished to avail himself of it to prove. And the notice to quit being such as the tenant was to act upon at the time, no subsequent recognition of the third executor will make it good by relation: nor was his joining in the ejectment evidence of his original assent to bind the tenant by the notice. *Right d. Fisher and Another* v. *Cuthell*, *M.* 45 *G.* 3. 491

JURISDICTION.

See London Court of Requests. Prize, No. 1. Prohibition.

1. An indictment for an assault, false imprisonment, and rescue, stated that the Judges of *the Court of record of the town and county, &c.* of P., issued their writ, directed to T. B., *one of the serjeants at mace of the said town and county*, to arrest W., by virtue of which T. B. was proceeding to arrest W. *within the jurisdiction of the said Court*, but that the defendant assaulted T. B. *in the due execution of his office*, and prevented the arrest: held such indict-

ment bad; it not appearing that *T. B.* was *an officer of the Court:* and that there could not be judgment after a *general* verdict on such a count as for a common assault and false imprisonment, because the jury must be taken to have found that the assault and imprisonment was for the cause therein stated, which cause appears to have been that the officer was attempting to make an illegal arrest of another, which being a breach of the peace, the defendant might, for aught appeared, have lawfully interfered to prevent it. *Rex* v. *Osmer*, *T.* 44 *G.* 3. 304

2. The stat. 39 *Geo.* 3. *c.* 79. giving a penalty of 20*l.* for printing papers to be published, without adding the printer's name and place of abode, directs that any penalty imposed by the act *exceeding* 20*l.* may be sued for in the courts *at Westminster:* and any penalty not exceeding 20*l.* *shall and may* be recovered before any justice of peace; but it also gives, in the same clause, a form of declaration *for recovering* 20*l.* *in the courts of Westminster.* Yet held that a common informer cannot sue for a penalty of 20*l.* in this court; no such power being given by the statute, and there being no power at common law for a common informer to sue for any penalty; and that the form of the declaration must be read *in blank*, as to the sum, such form being otherwise inapplicable to a larger penalty before given: and that no such action lay to recover two or more penalties of 20*l.* each. *Fleming qui tam* v. *Bailey*, *T.* 44 *G.* 3 313

JUSTICES OF PEACE, CONSTABLES, &c.

1. Where goods were taken by constables under a warrant of distress, granted by a justice of peace for the county of *Kent*, directed "to the constables of the Lower Half Hundred of *C.* and *G.* *in the county of* Kent;" which warrant recited that the plaintiff, (whose goods were distrained) *of the parish of* G. *in the said county*, was ballotted for the militia of the said county, and having refused to serve, &c. was convicted in a certain penalty; for levying which the warrant was granted; if it turn out that the warrant was executed within a certain part of the parish of *G.*, within the jurisdiction of the Cinque Ports, and *not within the county of* Kent, the constables are not within the protection of the stat. 24 *G.* 2. *c.* 44. *s.* 6., and may be sued in trespass without the magistrate's being made a defendant. *Milton* v. *Green and Jenner*, *T.* 44 *G.* 3. 233

2. A constable executing the warrant of a justice of peace, and sued in trespass, without the magistrate, is within the protection of the stat. 24 *G.* 2. *c.* 44. *s.* 6., and entitled to a verdict on proof of such warrant; having first complied with the plaintiff's demand of a perusal and copy of the warrant before the action brought, though not within *six* days after such demand, as the act directs. *Jones* v. *Vaughan*, *M.* 45 *G.* 3. 445

LEASEHOLD VALUE.

See COMPENSATION.

LONDON COURT OF REQUESTS.

The *London* Court of Requests has jurisdiction by the stat. 39 & 40 *G.* 3. *c.* 104. over a contract for the retention of tithes by the tenant, the value of which was under 5*l.* And therefore if the vicar sue for the same, and recover less than 5*l.* upon a count in assumpsit for a quantum valebant, the

the defendant may enter a suggestion on the roll, stating that he was a freeman and inhabitant of the city of *London*, trading there at the time he was served with the writ, for the purpose of ousting the plaintiff of his costs, under the 12th sect. of the act *Sandby*, *Clerk*, v. *Miller*, *E*. 44 *G*. 3. 194

MARRIAGE.

A. declared in covenant against *B*. and her husband, for that *B*., before her intermarriage, covenanted with *A*. by deed to leave certain accounts in difference between them to arbitration, and to *abide* and perform the award, provided it were made during their lives. And *A*. protesting that *B*. had not, before her intermarriage, performed her part of the covenant, averred that *after* making the indenture and *the intermarriage of the defendants* the arbitrator *awarded B*. to pay *A*. a certain sum; and then alleged a breach for non-payment of such sum. After verdict, on non est factum pleaded, held that upon this declaration it must be taken that *B*. *intermarried after* the submission and *before* the *award* made; in which case, although the plaintiff could not recover upon the breach assigned *for non-payment of the sum awarded*, because the *marriage* was a *countermand* to the *authority of the arbitrator*; yet as by the marriage itself *B*. had by her own act put it out of her power to perform the award, the covenant to *abide* the award was broken; and therefore judgment could not be arrested on the ground that the marriage was a revocation of the arbitrator's authority, and that so the plaintiff could not recover *as for a breach by non-performance of the award*. *Charnley* v. *Winstanley and his Wife*, *T*. 44 *G*. 3. 266

MASTER AND SERVANT.

See Action on the Case, No. 1.

MINES.

See Poor-rate, No. 3.

MISDEMEANOR.

See Agreement, No. 2.

MORTGAGE.

See Copyhold, No. 1.

NOTICE OF ACTION.

See Action, Notice of.

NOTICE TO QUIT.

Where a lease for 21 years contained a proviso, that in case either landlord or tenant, or their respective heirs and executors, wished to determine it at the end of the first 14 years, and should give six months' notice in writing *under his or their respective hands*, the term should cease; held that a notice to quit signed by *two only* of *three* executors of the original lessor, to whom he had bequeathed the freehold *as joint-tenants*, expressing the notice to be given *on behalf of themselves and the third executor*, was not good under the proviso, which required it to be given under the hands of all three. Neither could such notice be sustained under the general rule of law, that one joint-tenant may bind his companion by an act done for *his benefit*; for non constat that the determination of the lease was for the benefit of the co-joint-tenant; which it was incumbent on the party who wished to avail himself of it to prove. And the notice to quit being such as the tenant was to act upon at the time, no subsequent recognition of the third executor would make it good by relation: nor was his joining in the

 ejectment

ejectment evidence of his original assent to bind the tenant by the notice. *Right d. Fisher and Another* v. *Cuthell*, *M.* 45 G. 3. 491

PARENT AND CHILD.

See ACTION ON THE CASE, No. 1. for debauching the plaintiff's daughter.

1. The father of a child is entitled to the custody of it, though an infant at the breast of its mother, if the Court see no ground to impute any motive to the father injurious to the health or liberty of such a child, as by sending it out of the kingdom; the father being at the time an alien enemy domiciled in this kingdom, and the mother being an *Englishwoman*, and apprehensive only that he meant to send the child abroad, but assigning no sufficient reason for such her apprehension. *Rex* v. *de Manneville*, *E.* 44 G. 3. 221
2. If the putative father of a bastard child obtain possession of it by force or fraud, the Court will order it to be restored on the application of the mother. *Rex* v. *Moseley*, *H.* 38 G. 3. 224

PARTNERSHIP.

A., *B.*, and *C.*, having dissolved partnership, *C.*, after such dissolution drew bills in the partnership firm in favour of *D.*, he not knowing of such dissolution; upon which *D.* brought his action against all the former partners, and *C.* having pleaded his bankruptcy, *D.* entered a noli prosequi as to him, and recovered judgment against *A.* and *B.*, which was afterwards satisfied by the attorney of *A.* and *B.*, who advanced part, and borrowed the rest of the money on their *joint* credit: held that the sum so paid in satisfaction of the judgment might be recovered in a *joint* action by *A.* and *B.* against *C.* *Osborne and Ampblett* v. *Harper*, *T.* 44 G. 3. 225

PASSAGE-MONEY.

The plaintiff contracted to carry the defendant, his family, and luggage from *Demerary* to *Flushing*; and in the course of the voyage, within four days sail of *Flushing*, the ship was captured by an *English* ship of war, and brought into *England*, and the ship and cargo libelled for prize in the Court of Admiralty, and the cargo condemned, and proceedings still pending against the ship; but the defendant, and his family were liberated, and their luggage in fact restored to their possession. Held that, however the question might be as to the plaintiff's right to recover passage-money upon an implied assumpsit pro ratâ itineris if the ship were restored, yet pending the proceedings against the ship as prize in the Admiralty Court no such action could be maintained; for non constat, but that the ship might be condemned and the freight decreed to the captors. *Mulloy* v. *Backer*, *T.* 44 G. 3. 316

PAYMENT.

See ACCORD AND SATISFACTION, No. 1.

PENAL ACTION.

The stat. 39 G. 3. c. 79. giving a penalty of 20*l.* for printing papers to be published, without adding the printer's name and place of abode, directs that any penalty imposed by the act *exceeding* 20*l.* may be sued for in the courts at *Westminster*; and any penalty not exceeding 20*l.* *shall and may be* recovered before any justice of peace: but it also gives, in the same clause, a form of declaration *for recovering* 20l., in the courts of *Westminster*. Yet held that

that a common informer cannot sue for a penalty of 20*l.* in this court; no such power being given by the statute, and there being no power at common law for a common informer to sue for any penalty; and that the form of the declaration must be read *in blank*, as to the sum, such form being otherwise inapplicable to a larger penalty before given: and that no such action lay to recover two or more penalties of 20*l.* each. *Fleming, qui tam*, v. *Bailey*, *T.* 44 *G.* 3. 313

PLEADING.

See JOINDER IN ACTION.

1. A count upon an account stated with the plaintiff, *executrix*, &c. (not saying *as* executrix, &c.) cannot be joined with counts on promises to the testator; for it is no allegation that the promises were made to the plaintiff in her representative capacity; and under such a count proof might be given of an account stated with her in her individual character. *Qu.* Whether if it had been laid to be on an account stated with the plaintiff herself, though named *as executrix*, &c. it could be joined, as the cause of action would still appear to have arisen in the time of the executrix, though the money, when recovered, would be assets? *Henshall* v. *Roberts*, *in error*, *E.* 44 *G.* 3. 150

2. An allegation in pleading which is sensible and consistent in the place where it occurs, and not repugnant to *antecedent* matter, cannot be rejected as surplusage, though laid under a *videlicet*, and however inconsistent with an allegation *subsequent*. *Rex* v. *Stevens and Agnew*, *T.* 44 *G.* 3. 244

3. *A.* declared in covenant against *B.* and her husband, for that *B.* before her intermarriage covenanted with *A.* by deed to leave certain accounts in difference between them to arbitration, and to *abide* and perform the award, provided it were made during their lives. And *A.*, protesting that *B.* had not before her intermarriage performed her part of the covenant, averred that *after* making the indenture and *the intermarriage of the defendants*, the arbitrator *awarded* B. to pay *A.* a certain sum; and then alleged a breach for non-payment of such sum. After verdict, on non est factum pleaded; held that upon this declaration it must be taken that *B.* *intermarried after* the submission and *before* the *award* made; in which case, although the plaintiff could not recover upon the breach assigned, *for non-payment of the sum awarded*, because the *marriage* was a *countermand* to the *authority of the arbitrator*; yet as by the marriage itself *B.* had by her own act put it out of her power to perform the award, the covenant to *abide* the award was broken; and therefore judgment could not be arrested on the ground that the marriage was a revocation of the arbitrator's authority, and that so the plaintiff could not recover *as for a breach by non performance of the award*. *Charnley* v. *Winstanley and his Wife*, *T.* 44 *G.* 3. 266

4. The demandant in a writ of right must allege in his count that his ancestor was seised *of right* as well as that he was seised *in his demesne as of fee*. *Dowland* v. *Slade and Wife*, *T.* 44 *G.* 3. 272

5. *Qu.* Whether if one through whom title is derived be improperly stated to be heir to her brother, who it appears by the record had a son who survived him, and through whom title is properly derived, such erroneous appellation of the sister as heir to her brother, be fatal? *ib.*

6. In an action against the marshal for an escape, it being alleged in the declaration

claration that the prisoner was arrested on mesne process, and brought before a judge at chambers by virtue of a writ of habeas corpus, and was by him thereupon *committed* to the custody of the marshal, *as by the record thereof now remaining in the Court of B. R.* appears, &c. such allegation is either impertinent and surplusage; for properly speaking, such documents are not *records* nor capable of becoming so: or, considering them as *quasi of record*, the allegation is sufficiently proved by the production of them from the office of the clerk of the papers of the *K. B.* prison, with whom they are properly deposited. *Wigley* v. *Jones, Marshal of the Marshalsea*, *T.* 44 *G.* 3. 440

7. Slanderous words must be understood by the Court in the same sense as the rest of mankind would ordinarily understand them. Therefore where one said of another that "*his character was infamous; that he would be disgraceful to any society; that those who proposed him as a member of any society must have intended an insult to it; that he would publish his shame and infamy; that delicacy forbad him from bringing a direct charge, but it was a* MALE *child who complained to him*;" such words were understood to mean a charge of unnatural practices, and sufficiently certain in themselves to be actionable, without the aid of an inuendo to that purpose, which it was admitted could not enlarge the sense. And held that such words could not be justified by any plea naming, for the *first* time, the person from whom the defendant heard the complaint. *Woolnoth* v. *Meadows*, *M.* 45 *G.* 3. 463

8. A plea of *nul tiel record*, pleaded to an action of debt on an *Irish* judgment, must conclude to the country; for though, since the Union, such judgment be a record, yet it is only proveable by an examined copy on oath, the veracity of which is only triable by a jury. *Collins* v. *Lord Viscount Mathew*, *M.* 45 *G.* 3. 473

9. A bill of exchange payable to the *order* of *A.*, is payable to *A.* without alleging any order made; and it is sufficient to declare that *A. delivered* the bill to the defendant, which he *accepted*, and by reason of the premises, and according to the custom of merchants, became liable to pay the contents to *A.*, without alleging a *re-delivery* of the bill by the defendant: for if a re-delivery, or something tantamount, to shew the assent of the drawee to charge himself, be necessary to an acceptance, the demurrer, by admitting the acceptance, impliedly admits the re-delivery, &c. *Smith* v. *M'Clure*, *M.* 45 *G.* 3. 476

POOR-RATE.

1. Where goods are carried along two different lines of canal, one of which is by statute exempted from being rated in respect of the *tolls*, and the other not; though the voyage happen to finish on the unexempted line, where the tolls became due and are received, yet the canal company shall not be rated for more than such proportion of the tolls as accrued in respect of the carriage along the unexempted line. And the toll arising in respect of so much per ton per mile is to be rated only for so many miles as the goods were carried along the unexempted line. And where the act directs that the tolls should be exempt from any taxes, rates, &c. other than such as the *land* which should be used for the purpose of the navigation would have been subject to if the act had not been made; that goes to exempt the *tolls*, quà *tolls*, altogether from being rated in respect of the line

line so exempted, leaving the *land* rateable as before. *Rex* v *The Leeds and Liverpool Canal Company*, *T.* 44 *G.* 3. 325

2. Where a corporation was seised in fee of certain uninclosed lands, which were stocked with the cattle of the resident burgesses, or the widows of such, who alone were permitted by the burgesses to claim such right, and also by poor parishioners, who were admitted to such enjoyment from charity; and such lands were altogether omitted out of the poor-rate; the Sessions, on appeal by one who had given notice of his objection to the parish officers, and to the corporation as the party interested under the stat. 41 *G.* 3. *c.* 23. *s.* 6., having quashed the rate, the Court confirmed that order. *Rex* v. *The Inhabitants of Aberavon*, *M.* 45 *G.* 3. 453

3. *Iron mines* are not rateable to the relief of the poor; and being rated conjointly with *coal mines*, the coal whereof was raised by *the owner of the lands for his own use* in smelting the iron, the order of Sessions confirming such rate generally, without ascertaining the proportion at which each was rated, was quashed. *Rex* v. *Cunningham and Others*, *M.* 45 *G.* 3. 478

4. Where a corporation were seised in fee of lands, which by the custom were annually meted out under their control by a leet jury, according to a certain stint, to such of the resident burgesses who chose to stock the same; they paying 19*s.* 4*d.* to each of the other burgesses who did not stock: held that the burgesses who so stocked were *tenants in common* of the lands so occupied by them, and as *such occupiers* were liable to be rated for the same. *Rex* v. *Watson*, *M.* 45 *G.* 3. 480

POOR-REMOVAL.

See SETTLEMENT BY ESTATE, No. 1.

An order of justices removing "*M. F.*, *wife* of *P. F.*, a *Scotchman*, who never gained a settlement in *England*," and their children, to the place of *her* last legal settlement; which order was stated on the face of it to be made *on examination of the husband*, and *with the consent of him and his wife*, was holden good. *Rex* v. *The Inhabitants of Eltham*, *E.* 44 *G.* 3. 113

PRACTICE.

1. Affidavits in support of, or in answer to a rule for setting aside an award made a rule of Court under the stat. 9 & 10 *W.* 3. *c.* 15. *s.* 1., there being no action previously brought, nor any cause in court, need not be entitled. *Bainbridge* v. *Houlton*, *E.* 44 *G.* 3. 21

2. The Court will not infer that a writ of error was sued out for delay because it was sued out before final judgment signed. And though it should be made returnable before final judgment, it will still operate as a supersedeas upon the judgment, which, when signed in the same term, relates back to the first day of it; and therefore execution issued thereon after such writ of error allowed and served was set aside for irregularity. *Somerville* v. *White*, *E.* 44 *G.* 3. 145

3. If one of two defendants taken on a joint ca. sa. be discharged under an insolvent debtors' act, that will not operate as a discharge of the other, the discharge of the former not being with the actual consent of the plaintiff. *Nadin* v. *Battie and Wardle*, *E.* 44 *G.* 3. 147

4. The Court will quash a writ for irregularity if it have an informal return, although the day of the return be equally certain as in the common form. *Reubel* v. *Preston*, *T.* 44 *G.* 3. 291

5. An application to make the plaintiff, who resided abroad, give security

rity for the costs refused after notice of trial given; as the defendant might have applied earlier after knowledge of the fact of the plaintiff's residence, and before so much of the costs were incurred. *Walters* v. *Frythall*, T. 44 G. 3. 338

6. Where a writ of fi. fa. expires in the vacation, the sheriff need not return it till the first day of the ensuing term, and has the whole of that day to file it. *Rex* v. *The Sheriff of Berks*, T. 44 G. 3. 386

7. A demand of a plea indorsed on the declaration when delivered is good, and a rule to plead may be given afterwards, without any fresh demand of a plea. *Maxwell* v. *Skerrett*, M. 45 G. 3. 517

8. Bail may render without justifying; and where the rule expires in vacation a render on the first day of the ensuing term, sedente Curiâ, is good, though notice were not given till afterwards on the same day, and after a writ of procedendo had issued to the inferior court where the cause originated. *Wiggins* v. *Stephens*, M. 45 G. 3. 533

PRESSING.

1. The Court will not, at the prayer of the *master*, grant a habeas corpus to bring up an apprentice impressed, he being willing to enter into the king's service. *Ex parte John Landsdown*, E. 44 G. 3. 38

2. A seaman serving in the merchant service is not exempt from being impressed because he is a freeholder. *Rex* v. *Douglas*, M. 45 G. 3. 477

PRINCIPAL AND AGENT.

One who covenants for *himself, his heirs*, &c. and under his *own hand and seal*, for the act of another, shall be personally bound by his covenant, though he describe himself in the deed as covenanting *for and on the part and behalf of such other person*. *Appleton* v. *Binks*, E. 44 G. 3. 148

PRINTERS.

See PENAL ACTION, No. 1.

PRIZE.

See FOREIGN SENTENCES, PASSAGE-MONEY.

The Prize Court of Appeals has jurisdiction to decree that one who was co agent of the captors, in whose hands the proceeds of the prize after condemnation and sale were placed, should, after a decree of restitution with interest pronounced against the captors, pay *interest* on such proceeds while in his hands to the claimant. And *B. R.* will not grant a prohibition to the Prize Court to restrain it from executing such decree, either on the ground that it did not appear on the proceedings below that the agent was a *registered* agent under the stat. 33 G. 3. c. 66.; because that Court has original jurisdiction *in rem* and its incidents, independent of the statute; nor on the ground that the Court below were restrained by the 32d clause of the act from decreeing restitution of more than the *net proceeds* of the sale, awarded upon condemnation; because *interest* made of such *net proceeds* in the hands of the holder are to be deemed part of the proceeds; nor on the ground that it was not alleged that *interest* had *in fact* been made by such agent; because that was a fact for the Court below to decide upon, and they must be presumed to have decided on satisfactory evidence. *Willis* v. *The Commissioners of Appeals in Prize Causes*, E. 44 G. 3. 22

PROHIBITION.

Where the Spiritual Court incidentally determines any matter of common law cognizance, such as the construction of an act of parliament, other-

otherwise than as the common law requires, prohibition lies after sentence; although the objection do not appear upon the face of the libel, but is collected from the whole of the proceedings below. *Gould* v. *Gapper, Clerk, T.* 44 *G.* 3. 345

PROMOTIONS.

Mr. *Mansfield*, one of the King's counsel, on the death of Lord *Alvanley*, Lord Chief Justice of *C. B.* was promoted to that office in *Hilary* vacation 1804, and was knighted. And on the 25th of *April* was called to the degree of Serjeant at Law, and took his seat on the bench, and gave rings with this motto, *Serus in cœlum redeas.*

On *Saturday* the 28th of *April* 1804 the following gentlemen took their places within the Bar:

As King's Serjeant, Mr. Serjeant *Williams.*

As King's Counsel, Mr. *Holroyd*, Mr. *Milles*, Mr. *Wilson*, Mr. *Topping*; and with a patent of precedence, Mr. *Fonblanque.* 1

In the *Trinity* vacation 1804 Mr. *Gibbs* was made Chief Justice of *Chester*; and Messrs. *Cox, Harvey*, and *Stanley*, Barristers at Law, were appointed Masters in Chancery. 445

RECORD.

1. In an action against the marshal for an escape, it being alleged in the declaration that the prisoner was arrested on mesne process, and brought before a Judge at chambers by virtue of a writ of habeas corpus, and was by him thereupon *committed* to the custody of the marshal, *as by the record thereof now remaining in the court of* B. *R.* appears, &c. such allegation is either impertinent and surplusage; for, properly speaking, such documents are not *records*, nor capable of becoming so: or, considering them as *quasi of record*, the allegation is sufficiently proved by the production of them from the office of the clerk of the papers of the *K. B.* prison, with whom they are properly deposited. *Wigley* v *Jones, marshal of the Marshalsea, T.* 44 *G.* 3. 440

2. A scire facias upon a recognizance of bail taken in open court in *B. R.* is properly suable in *Middlesex*, where the record is, though all the previous proceedings which commenced by original were in *London*. And semble that it could not be sued elsewhere than in *Middlesex*. *Coxeter* v. *Burke and Another, Bail of Price, M.* 45 *G.* 3. 461

3. A plea of *nul tiel record*, pleaded to an action of debt on an *Irish* judgment recovered, must conclude to the country; for though, since the Union, such judgment be a record, yet it is only proveable by an examined copy on oath, the veracity of which is only triable by a jury. *Collins* v. *Ld. Viscount Mathew, M.* 45 *G.* 3. 473

RELATION.

See Joint Tenant, No. 1.

REQUESTS, LONDON, COURT OF.

See London Court of Requests.

RIGHT, WRIT OF.

1. The demandant in a writ of right must allege in his count that his ancestor was seised *of right*, as well as that he was seised *in his demesne as of fee*. *Dowland* v. *Slade and Wife, T.* 44 *G.* 3. 272

2. *Qu.* Whether if one, through whom title is derived, be improperly stated to be *heir* to her brother, who it appears by the record had a son who survived him, and through whom title is properly derived, such erroneous appellation of the sister, as heir to her brother, be fatal? *ib.*

ROGUE

ROGUE AND VAGABOND.

See VAGRANT.

SEAMAN.

See PRESSING.

SETTLEMENT.

See POOR REMOVAL, No. 1.

By Apprenticeship.

Where a sum agreed to be given with an apprentice was five guineas, which was inserted in the indenture, and the duty paid accordingly, by stat. 8 *Ann. c.* 9.; held well, though in fact only four guineas were paid; for the *full sum received, given, paid, agreed, or contracted for,* as required by the act, was inserted, and the duty paid for it; and the stamp used was of the same description, and the duty appropriated to the same fund, as if four guineas only had been inserted and paid for, supposing that would have sufficed. *Rex* v. *The Inhabitants of Keynsham,* T. 44 G. 3. 309

By Estate.

One who is resident on an estate granted to him for lives, in consideration of two guineas fine and 1*s.* rent, cannot be removed therefrom, though actually chargeable. But semble he cannot gain a settlement by 40 days residence as on *his own* estate under the stat. 9 *G.* 1., the consideration being under 30*l.* *Rex* v. *The Inhabitants of Martley, E.* 44 *G.* 3. 40

By Evidence of Relief.

The Sessions having decided in favor of a settlement in *A.* by which the pauper's father was proved to have been *relieved while resident in another parish* 40 years ago, and before the pauper's birth; and the only evidence to oppose this being that of the pauper's own birth in *B.* this Court confirmed the order of Sessions on a case reserved. *Rex* v. *The Inhabitants of Wakefield,* T. 44 G. 3. 335

By Hiring and Service.

1. Where nothing is said in a contract of hiring about time but a reservation of *weekly* wages, it is a *weekly hiring* only. Therefore where the contract was for the servant to live with his master, the latter finding him board and lodging, and *paying him 2s. 6d. per week,* no settlement could be gained by service for more than a year under such contract. *Rex* v. *The Inhabitants of Pucklechurch, T.* 44 G. 3. 382

By taking a Tenement.

1. Where a corporation, by a verbal agreement with a pauper, leased to him the tolls of a market for above 10*l.* a-year; held that he could not gain a settlement thereby, as no interest could pass from a corporation but under their seal; therefore he had no more than a mere licence to collect the toll. But if such toll had been leased to him under seal of the corporation, semble that he would have gained a settlement by residing for 40 days in the same parish where the market was. *Rex* v. *The Inhabitants of Chipping-Norton, T.* 44 G. 3. 239

2. One may gain a settlement by renting a tenement of above 10*l.* a-year in the parish where he *resided,* though such residence be *in a turnpike house,* as servant to the collector for whom he received the tolls; for the general turnpike act 13 *G.* 3. *c.* 84. *s.* 56. only says that "no gate-keeper or person *renting the tolls and residing in the toll-house* shall *thereby* gain a settlement, *i. e.* by such taking of the toll-house or renting the tolls. *Rex* v. *The Inhabitants of Denbigh, T.* 44 *G.* 3. 333

SHARE.

See DEVISE, No. 6.

SHIPS.

1. The ship register acts do not apply to a transfer of property by operation of law, such as from the commissioners to the assignees of a bankrupt. *Bloxam Knight and Others, Assignees of Ward, a Bankrupt,* v. *Hubbard, T.* 44 *G.* 3. 407

2. Under the ship register acts 7 & 8 *W.* 3. *c.* 22. *s.* 21., and 26 *G.* 3. *c.* 60. *s.* 3, 4, 5. 16., and 34 *G.* 3. *c.* 68. *s.* 15, 16. in order to make title to a ship sold at sea, whether in whole or in part, such sale must be acknowledged by indorsement of the certificate of registry in the manner therein described, and a copy of such indorsement be delivered by the vendee to the persons authorized to make registry, (which officers are *directed* to make an entry thereof, to be indorsed on the oath or affidavit upon which the original certificate of registry was obtained, and to make a memorandum in the book of registers, and to give notice thereof to the commissioners of the customs;) and it is not sufficient for the vendee to register such ship de novo in another port where he resided, though he removed the ship thither, and she never returned to her original port after the sale. *ib.*

SLANDER.

Slanderous words must be understood by the Court in the same sense as the rest of mankind would ordinarily understand them. Therefore where one said of another that "*his character was infamous; that he would be disgraceful to any society; that those who proposed him a member of any society must have intended an insult to it; that he would publish his shame and infamy; that delicacy forbad him from bringing a direct charge, but it was a* MALE *child who complained to him;*" such words were understood to mean a charge of unnatural practices, and sufficiently certain in themselves to be actionable, without the aid of an inuendo to that purpose, which it was admitted could not enlarge the sense. And held that such words could not be justified by any plea naming for the first time the person from whom the defendant heard the complaint. *Woolnoth* v. *Meadows, M.* 45 *G.* 3. 463

SPIRITUAL COURT.

See PROHIBITION.

STAMPS.

Where a sum agreed to be given with an apprentice was five guineas, which was inserted in the indenture, and the duty paid accordingly, by stat. 8 *Ann. c.* 9.; held well; though in fact only four guineas were paid; for *the full sum received, given, paid, agreed, or contracted for*, as required by the act, was inserted, and the duty paid for it; and the stamp used was of the same description, and the duty appropriated to the same fund, as if four guineas only had been inserted and paid for, supposing that would have sufficed. *Rex* v. *The Inhabitants of Keynsham, T.* 44 *G.* 3. 309

STATUTES.

The construction thereof, though relating to matters of an ecclesiastical nature, belongs to the superior courts of common law. *Gould* v. *Gapper, T.* 44 *G.* 3. 345

Edward I.

6. *c.* 1. (Stat. of *Gloucester.* Costs.) 262

Henry VIII.

23. *c.* 15. (Costs.) *ib.*

James I.

4. *c.* 3. (Costs.) *ib.*

Charles II.

13. *st.* 2. *c.* 2. (Costs in error.) 545

STOCK.

1. In an action on the case for not accepting stock agreed to be transferred on request, an averment that the plaintiff was ready and willing to transfer, and requested the defendant to accept the stock, which he refused, can only be satisfied by shewing an actual tender and refusal, or that the plaintiff waited at the Bank on the day when it was understood that the transfer was to be made until the close of the transfer books, which was the latest time when the transfer could be made. *Bordenave* v. *Gregory*, *E.* 44 *G.* 3. 107
2. Semble that in such an action it is not necessary by the stat. 7 *G.* 2. c. 8. s. 6. for the plaintiff to shew that he transferred the stock to another at the *next* possible transfer day after default made by the original contractor, provided the stock were transferred before the action brought: though, if the plaintiff might have obtained more for the stock by a sale on any intermediate day between the original default and the actual sale, that will go in reduction of the damages sustained by the plaintiff by such default. *ib.*
3. In another case of the same kind, the evidence being that the stock was contracted to be transferred on *a certain day*, and the averment in the declaration being the same as in the above case, that it was to be transferred *on request*, the Court said, that if the objection had been taken at the trial there must have been a nonsuit. *Bordenave* v. *Bartlett*, *E.* 44 *G.* 3. 111

SURPLUSAGE.

An allegation in pleading which is sensible and consistent in the place where it occurs, and not repugnant to *antecedent* matter, cannot be rejected as surplusage, though laid under

under a *videlicet*, and however inconsistent with an allegation *subsequent*. *Rex* v. *Stevens and Agnew*, T. 44 G. 3. 244

STOPPING IN TRANSITU.

Where *A.* and *B.*, traders living in *London*, were in the course of ordering goods of the defendants, cotton manufacturers at *Manchester*, *to be sent* to *M.* and Co. *at Hull*, for the purpose of being afterwards sent to the correspondents of *A* and *B. at Hamburgh*; and on the 31st of *March A.* and *B.* sent orders to the defendants for certain goods *to be sent* to *M.* and Co. *at Hull, to be shipped for* Hamburgh *as usual*: held that as between buyer and seller the right of the defendants to stop as *in transitu* was at an end when the goods came to the possession of *M.* and Co. *at Hull*; for they were for this purpose the appointed agents of the vendees, and received orders from them as to the ulterior destination of the goods; and the goods, after their arrival at *Hull*, *were to receive a new direction from the vendees*. But it was competent for *A.* and *B.*, who became insolvent some time in *July*, but committed no act of bankruptcy till the 26th of *September*, to agree bonâ fide, and not from motives of voluntary and undue preference, to give up the goods to the defendants in the latter end of *July*. And held that the circumstances of the bankrupts having called a meeting of their creditors, and having taken legal advice, and being encouraged by the result of such meeting and advice to give up the goods, was evidence for the jury to find that the goods were given up bonâ fide, and not from any motive of voluntary and undue preference to the defendants; though done by the bankrupts in a situation of impending bankruptcy at the time; the defendants, at the time of such giving up of the goods by the bankrupts, holding possession of the goods upon a claim of right to stop them in transitu. *Dixon and Others, Assignees of Battier and Son, Bankrupts*, v. *Baldwin and Another*, E. 44 G. 3. 175

SUPERSEDEAS.

See PRACTICE, No. 2.

TENANTS IN COMMON.

Where a corporation were seised in fee of lands, which by the custom were annually meted out under their control by a leet jury, according to a certain stint, to such of the resident burgesses who chose to stock the same; they paying 19*s.* 4*d.* to each of the other burgesses who did not stock: held that the burgesses, who so stocked, were tenants in common of the lands so occupied by them, and as such occupiers were liable to be rated for the same. *Rex* v. *Watson*, M. 45 G. 3. 480

TENDER AND REFUSAL.

See EVIDENCE, No. 2.

TITHES.

The *London* Court of Requests has jurisdiction, by the stat. 39 & 40 G. 3. c. 104. over a contract for the retention of *tithes* by the tenant, the value of which was under 5*l.*; and therefore if the vicar sue for the same, and recover less than 5*l.* upon a count in assumpsit for a quantum valebant, the defendant may enter a suggestion on the roll, stating that he was a freeman and inhabitant of the city of *London*, trading there at the time he was served with the writ, for the purpose of ousting the plaintiff of his costs under the 12th section of the act. *Sandby, Clerk*, v. *Miller*, E. 44 G. 3. 195

TOLERATION ACT.

See FALSE IMPRISONMENT, No. 1.

TOLLS.

See TURNPIKE.

1. Where it appeared in evidence upon an action of indebitatus aſſumpſit for toll that a corporation were entitled by a general grant of toll, explained by uſage to be due for all commercial goods paſſing in and out of their city on horſes or in carts or waggons (that is, at the rate of 1*d*. for every horſe load, and 2*d*. for every cart-load drawn by one horſe, and 2*d*. more for each additional horſe); held that any alteration of the carriage by which the goods were ſo conveyed, as by taking them in ſtage coaches inſtead of carts or waggons, could not vary the right of toll in the proportion of 2*d*. for each horſe drawing the coach, although the number of horſes were eſtimated by the weight of paſſengers rather than of goods. *The Mayor &c. of Carliſle* v. *Wilſon*, *E.* 44 *G*. 3. 2

2. Where a corporation by a verbal agreement with a pauper leaſed to him the tolls of a market for above 10*l*. a-year; held that he could not gain a ſettlement thereby, as no intereſt could paſs from a corporation but under their ſeal: therefore he had no more than a mere licence to collect the toll. But if ſuch toll had been leaſed to him under ſeal of the corporation, ſemble that he would have gained a ſettlement by reſiding for 40 days in the ſame pariſh where the market was. *Rex* v. *The Inhabitants of Chipping-norton*, *T.* 44 *G*. 3. 239

3. Where goods are carried along two different lines of canal, one of which is by ſtatute exempted from being rated in reſpect of the *tolls*, and the other not; though the voyage happen to finiſh on the unexempted line where the tolls become due and are received, yet the Canal Company ſhall not be rated for more than ſuch proportion of the tolls as accrued in reſpect of the carriage along the unexempted line. And the toll ariſing in reſpect of ſo much per ton per mile is to be rated only for ſo many miles as the goods were carried along the unexempted line. And where the act directs that the tolls ſhould be exempt from any taxes, rates, &c. other than ſuch as the *land* which ſhould be uſed for the purpoſe of the navigation would have been ſubject to if the act had not been made; that goes to exempt the *tolls*, qua *tolls*, altogether from being rated in reſpect of the line ſo exempted, leaving the *land* rateable as before. *Rex* v. *The Leeds and Liverpool Canal Company*, *T.* 44 *G*. 3. 325.

TRESPASS.

See FALSE IMPRISONMENT.

1. Where goods were taken by conſtables under a warrant of diſtreſs granted by a juſtice of peace for the county of *Kent*, directed "to the conſtables of the lower Half Hundred of *C*. and *G*. *in the county of* Kent;" which warrant recited that the plaintiff (whoſe goods were diſtrained), *of the pariſh of* G. *in the ſaid county*, was ballotted for the militia of the ſaid county, and having refuſed to ſerve, &c. was convicted in a certain penalty, for levying which the warrant was granted: if it turn out that the warrant was executed within a certain part of the pariſh of *G*. within the juriſdiction of the Cinque Ports, and *not within the county of* Kent, the conſtables are not within the protection of the ſtat. 24 *G*. 2. *c*. 44. *ſ*. 6. and may be ſued in treſpaſs without the magiſtrate's being made a defendant. *Milton* v. *Green and Jenner*, *T.* 44 *G*. 3. 233

2. A

2. A constable executing the warrant of a justice of peace, and sued in trespass, without the magistrate, is within the protection of the stat. 24 *G.* 2. *c.* 44. *s.* 6. and entitled to a verdict on proof of such warrant; having first complied with the plaintiff's demand of a perusal and copy of the warrant before the action brought, though not within *six* days after such demand, as the act directs. *Jones* v. *Vaughan*, *M.* 45 *G.* 3. 445

TROVER.

1. An order of the Lord Chancellor, made under the stat. 5 *G.* 2. *c.* 30., upon the petition of creditors, for removing one of several Assignees of a bankrupt's estate, not followed up by any re-assignment or release of such assignee to the remaining assignees, nor by any new assignment of the commissioners under the Lord Chancellor's further order, does not operate to divest the legal estate out of such removed assignee: and consequently he ought to join in an action of trover brought by the assignees for a ship belonging to the bankrupt's estate. *Bloxam and Others, Assignees of Ward, a Bankrupt*, v. *Hubbard*, *T.* 44 *G.* 3. 407
2. But if he be not joined, advantage can only be taken by plea in abatement to the whole action; though if there be no such plea the other assignees who sue can only recover their proportional parts. *ib.*
3. A sale of a ship (which was afterwards lost at sea) made by the defendant, who claimed under a defective conveyance from a trader before his bankruptcy, is a sufficient conversion to enable the assignees of the bankrupt to maintain trover, without shewing a demand and refusal. *ib.*

TURNPIKE.

One may gain a settlement by renting a tenement of above 10*l.* a-year in the parish where he *resided*, though such residence were *in a turnpike-house*, as servant to the collector for whom he received the tolls; for the general turnpike act 13 *G.* 3. *c.* 84. *s.* 56. only says that "no gate-keeper or person *renting the tolls and residing in the toll-house*, shall *thereby* gain a settlement," *i.e.* by such taking of the toll-house or renting the tolls. *Rex* v. *The Inhabitants of Denbigh*, *T.* 44 *G.* 3. 333

UNTIL.

See Indictment, No. 12.

VAGRANT.

By the vagrant act 17 *G.* 2. *c.* 5. after a rogue and vagabond has been committed to the Sessions, and they, adjudging him to be *a rogue and vagabond*, order him to be further imprisoned and kept to hard labour for six months, and to be publicly *whipped* during that time, and that after the expiration of his imprisonment he should be *sent and employed in his Majesty's service pursuant to the statutes*, &c.: held that the whole forms one sentence; and such order being defective in the latter part, for want of adjudicating whether the party were to serve his Majesty by *sea* or *land* as discriminated in the statute, the conviction shall be quashed, though the former part of the sentence, adjudging *the rogue and vagabond* to be *whipped*, be valid. *Rex* v. *Patchett*, *T.* 44 *G.* 3. 339

VALUATION OF PREMISES.

See Compensation.

VARIANCE. See Stock, No. 3.

VIDELICET.

An allegation in pleading which is sensible and consistent in the place where it occurs, and not repugnant

to *antecedent* matter, cannot be rejected as surplusage, though laid under a videlicet, and however inconsistent with an allegation *subsequent*. *Rex* v. *Stevens and Agnew*, *T.* 44 *G.* 3. 244

See INDICTMENT, No. 1, 2, 3.

VENUE.

A scire facias upon a recognizance of bail taken in open court in *B. R.* is properly suable in *Middlesex*, where the record is; though all the previous proceedings which commenced by original were in *London*. And semble that it could not be sued elsewhere than in *Middlesex*. *Coxeter* v. *Burke and Another*, *Bail of Price*, *M.* 45 *G.* 3. 461

WEST INDIA DOCKS.

The stat. 39 *G.* 3. *c.* 69. *f.* 184. directs that the *West India* Dock Company shall sue in the name of their treasurer in all actions by or on behalf of the Company, and that he shall be sued for the recovery of any claim or demand upon, or of any damages occasioned by the Company; and *f.* 185, after extending the protection of the stat. 24 *G.* 2. *c.* 44. for privileging justices of the peace in actions brought against them, as such, to the lord mayor and aldermen of *London* acting under this act beyond the limits of the city; directs that "no action shall be commenced against *any person or persons for any thing* done *in pursuance or under colour of this act*, until after 14 days' notice in writing, or after tender of amends," &c.: held that the treasurer of the Company is a *person* within the said clause; and being sued for an act done by the Company which induced an injury to the plaintiffs, was entitled to such notice before the action brought. The notice is necessary in actions for trespasses or torts; but *qu.* Whether in assumpsit? *Wallace* v. *Smith*, *Treasurer of the West India Dock Company*, *E.* 44 *G.* 3. 115

WILL.

See COPYHOLD, No. 1. DEVISE.

WORDS, CONSTRUCTION OF.

"*Charges.*" *See* CHARGES.
"*Share.*" *See* DEVISE, No. 6.
"*Unless.*" *See* AGREEMENT, No. 3 and 5.
"*Until.*" *See* INDICTMENT, No. 12.

WRIT.

See PRACTICE, No. 6.

The Court will quash a writ for irregularity if it have an informal return, although the day of the return be equally certain as in the common form. *Keulel* v. *Preston*, *T.* 44 *G.* 3. 291

WRIT OF RIGHT.

See RIGHT, WRIT OF.

END OF THE FIFTH VOLUME.

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